Petition

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ALEXANDER L. STEVAS.
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No. 81-2128

IN THE

Supreme Court of the United States

October Term, 1981

LEO MARINELLO, LEONARD MARINELLO, and SAUL SAVETH, Owners of Damage Parcels Nos. 1, 2 and 5 through 15, inclusive,

Petitioners,

against

THE CITY OF NEW YORK,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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Questions Presented.

1. Did the City of New York unconstitutionally abuse its power of eminent domain by penalizing petitioners and awarding them approximately 24% less than the value of their property at the time it was taken, where the City (i) to save itself the cost of acquisition, encouraged petitioners to avoid condemnation by privately redeveloping their property in accordance with the City's wishes and (ii) refused to permit petitioners to attempt to keep their property through redevelopment unless they first agreed to waive their right to full and just compensation in the event they did not satisfy the City's revelopment demands and the City later decided to condemn?

2. Were petitioners denied their constitutional right to equal protection of the law where petitioners alone, out of 17 similarly situated property owners, arbitrarily were forced to accept a penalty clause providing for reduced compensation in the event of a future condemnation?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981.

◆

LEO MARINELLO, LEONARD MARINELLO, and SAUL SAVETH, Owners of Damage Parcels Nos. 1, 2 and 5 through 15, inclusive,

Petitioners,

against

THE CITY OF NEW YORK,

Respondent. *

◆

Petition for a Writ of Certiorari to the Court of Appeals of the State of New York.

The petitioners Leo Marinello, Leonard Marinello and Saul Saveth respectfully pray for a writ of certiorari to review the decision of the Court of Appeals of the State of New York entered on June 9, 1981.

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*The parties to the proceedings below were (i) Claimants Leo Marinello, Leonard Marinello and Saul Saveth, owners of Damage Parcels Nos. 1, 2 and 5 through 15, inclusive; (ii) claimant Tully & DiNapoli, Inc., owner of Damage Parcel No. 19; and (iii) respondent The City of New York. Claimant Tully & DiNapoli, Inc., has no interest in the outcome of this appeal. Pursuant to Rule 10(4) of this Court, notice of this fact is being served and filed simultaneously herewith.

Opinions Below.

The opinion of the New York Court of Appeals is reported officially at 53 N.Y.2d 1023 and unofficially at 442 N.Y.S.2d 483.

The opinion of the Appellate Division, Second Department is reported officially at 76 A.D.2d 349 and unofficially at 430 N.Y.S.2d 626.

The decision of the trial court is unreported.

All three opinions, insofar as they relate to the subject property, are reproduced in the appendix hereto.

Jurisdiction.

Petitioners' appeal as of right on constitutional grounds was dismissed by the New York Court of Appeals on June 9, 1981, on the ground that "no substantial constitutional question is directly involved."

Petitioners' timely motions thereafter for leave to appeal to the New York Court of Appeals (so as to have the case decided on the basis of the non-constitutional issues involved) were denied by the Appellate Division, Second Department, on December 21, 1981, and by the Court of Appeals on February 25, 1982.

This petition for certiorari timely was filed within 90 days of the Court of Appeals' denial of petitioners' motion for leave to appeal. *See American Railway Express Co. v. Levee,* 263 U.S. 19, 20-21 (1923).

This Court's jurisdiction is invoked pursuant to Article 3, Section 2, clause 2, of the United States Constitution and 28 U.S.C. §1257(3).

Constitutional Provisions Involved.

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 1 of the 14th Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due prócess of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

Petitioners owned a 653,000 square foot property in College Point, Queens, New York, on which they operated a successful golf range—amusement facility called "Golf City."

On June 25, 1974, petitioners' property was condemned by the City of New York. Although the principle of just compensation requires that an owner be compensated for the fair market value of his property as of the date it is taken (*United States v. Miller,* 317 U.S. 369, 374 [1943]), petitioners were not so compensated. Instead, they were paid only for the value of their property as of January 1, 1972, more than two years prior to the taking. This resulted in petitioners being paid approximately 24% less than the fair value of their property.*

The payment of less than full compensation to petitioners is based on the New York courts' holding that petitioners waived their right to full compensation and agreed to be bound to a fixed, January 1, 1972 valuation date.

Petitioners' alleged waiver arose out of their negotiations with the New York City Public Development Corporation ("PDC"), a quasi-public corporation which acted on the City's behalf in this matter. It is undisputed that the City wanted to acquire approximately 500 acres in College Point to build an industrial park. However, to save the city the expense of condemnation, PDC urged all owners in the area, including petitioners, to submit proposals for private redevelopment of their property in conformity with the Industrial Development Plan. Owners whose plans were deemed satisfactory would be excluded from condemnation upon the formation of binding contracts for the carrying out of proposals.

On September 9, 1971, petitioners submitted such a proposal to PDC in the form of a letter of intent which outlined their plan to redevelop Golf City to conform to the Industrial Development Plan (A71-75).** Pursuant to the

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*The trial court determined that between January 1, 1972 and June 25, 1974, real estate values in the area increased 10% per year.

**Numbers in parentheses preceded by "A" refer to pages of petitioners' appendix.

City's suggestion, petitioners proposed to dramatically redevelop their parcel with a multi-level structure combining industrial development on a lower level, commercial development on a second level, and a golf driving range on the roof.

At PDC's insistence, a clause, drafted by PDC, was included in petitioners' detailed redevelopment proposal stating that if petitioners failed to meet their anticipated contractual obligation by not completing the project, their property would be valued as of January 1, 1972, if the City subsequently decided to condemn it (A74-75). Although PDC took it upon itself to demand such a penalty clause from petitioners, the Industrial Development Plan pursuant to which PDC acted did not provide for the imposition of a penalty upon owners who would attempt private development.

PDC found petitioners' proposal compatible with the Industrial Development Plan; however, it never accepted the proposal nor signed the letter of intent although requested by petitioners to do so. It refused to enter into a binding contract with petitioners because it had doubts about the project's feasibility and petitioners' ability to finance it.

More than a year after submission of the letter of intent, petitioners' property was excluded from the first condemnations under the Plan which occurred in December, 1972. Sixteen other parcels like Golf City, although authorized to be condemned, were also excluded from this initial taking. This mass exclusion was carried out pursuant to PDC's policy (in order to save the City the cost of acquisition through private redevelopment) of temporarily excluding any parcel from condemnation if its owner expressed any interest, however minimal, in privately developing the property in conformity with the Industrial

Development Plan. Thus, while petitioners' proposal conformed to the Industrial Development Plan, certain other excluded owners submitted wholly unacceptable plans, and others, no formal plans at all.

Not one of the 16 other excluded owners were required, like petitioners, to agree to a penalty clause waiving the right to full compensation in order to be temporarily excluded.

Negotiations continued between petitioners and PDC until January, 1974, during the course of which petitioners submitted numerous variations and refinements of their development plans and also lined up potential financing for the project. However, PDC neither approved the plans nor submitted them to the necessary City agencies for review due to its continued doubts about the financing. A contract was never entered.

Finally, in January, 1974, PDC refused to consider further plans submitted by petitioners. By this time, petitioners found that they no longer could go ahead with the proposed project since it had become financially impossible due to the sharp increase in construction costs during the extended period while PDC was considering their plans. PDC then moved to condemn the property.

It should be noted that while the City acquired Golf City for inclusion in its industrial park, the planned park in actuality was a dismal failure. As of June, 1976, the date of the trial of this action, it was established that (i) only 80 of the approximately 300 acres in the area available for industrial development were developed or committed to such development, (ii) apart from petitioners' proposals, PDC never had any plans or proposals for the redevelopment of Golf City and (iii) after the taking, petitioners, as tenants of the City, still occupied the site on a reduced scale. Moreover, 13 of the 17 parcels which, like Golf City, were temporarily excluded from the December, 1972 taking, never were taken by the City. Claims by the City, therefore, that the 10% yearly increase in property values somehow was due to the City's efforts in the area, are without merit.

The trial court held petitioners were bound to the penalty clause. The court concluded they purportedly had offered to accept the fixed valuation date, which it held "was in reality an offer to take a lesser amount than a future condemnation might yield" (A29), in exchange for the City's temporary forbearance from condemning Golf City while PDC reviewed their proposed development plans. While no such offer was expressed in the letter of intent, the court held that it was "instinct" in the letter since, in submitting it, petitioners purportedly were seeking a "temporary exclusion from what they knew would be an imminent taking."* While clearly there was no bilateral contract between the parties, the court found PDC's exclusion of Golf City from the December, 1972 taking to be "acceptance" by unilateral performance of petitioners' offer to be bound to the fixed valuation date (A25-28).

The Appellate Division affirmed this determination, holding petitioners had waived their right to just compensation and were bound by the fixed valuation date on the ground that PDC excluded petitioners' property from the December, 1972 taking solely in reliance "on the clause in the September 9, 1971 letter that in the event of ultimate condemnation January 1, 1972 would be recognized as the award of payments date" (A11, A16).

Raising the Constitutional Questions.

At trial, counsel for petitioners moved to strike the letter of intent from evidence on the ground that, if the penalty clause contained therein were enforced, it would deprive petitioners of their constitutional rights (A67-69). The trial court denied the motion to strike (A69-70), and, in its memorandum decision, held petitioners' waiver of full compensation to be constitutional and not a denial of just compensation (A29), stating:

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*In fact, at the time petitioners submitted the letter of intent, condemnation had not yet been approved by the Board of Estimate, and the first takings did not take place until December 1, 1972, more than 14 months later.

> " 'There is no doubt that an owner of land taken by eminent domain may waive his right to compensation or damages, or be estopped to make such claim.' (See 3 Nichols, Eminent Domain [Rev. 3d ed.] §8.82, p. 248.) If an owner may waive *all* compensation or be estopped from making any claim for it, then surely, *a fortiori,* he may waive or be estopped from making any claim for part."

The court further held that the fixed valuation date clause in petitioners' letter of intent amounted to "an agreement relating to the amount of an award for the value of land. Constitutional provisions do not prevent such an agreement" (A29).

After the hearing of objections the trial court reached the issue of the discriminatory treatment accorded petitioners, *i.e.,* that they were the only owners required to waive full compensation in order to receive a temporary exclusion from condemnation. The court merely held that such different treatment "does not by itself alter the factual basis of this court's prior decision" (A50).

In the Appellate Division, Second Department, petitioners urged that (i) the City had unconscionably abused its power of eminent domain in requiring petitioners to waive their right to full compensation in order to be allowed to submit a redevelopment proposal, (ii) the City's arbitrary and discriminatory imposition of the penalty clause on them alone was a denial of equal protection, and (iii) they had been denied just compensation.

The Appellate Division affirmed, overlooking the unconscionable and discriminatory actions of the City in imposing a 24% penalty on petitioners' condemnation award. That court, quoting this Court's decision in *Albrecht v. United States,* 329 U.S. 599, 603 (1947), merely held that the constitution does not prohibit agreements as to compensation for condemned property. The court also held there is no prohibition upon a party's waiving a portion of the compensation due for the taking of his property (A14-17).

The Appellate Division further found that petitioners had not been denied equal protection of the law in that valid reasons purportedly existed for the City's requirement of a waiver of compensation from petitioners alone. Significantly, three other parcels, like Golf City, were excluded from the 1972 taking and then were condemned in 1974. Unlike petitioners, however, the owners of these three parcels were not penalized and were paid the full 1974 value of their properties. Although no valid reason existed for the preferential treatment these owners received, the court justified the City's discriminatory behavior on the ground that there was a "fair inference * * * that the others were nowhere near the money value of [petitioners'] holdings" (A17-18).

Although in a motion for reargument or leave to appeal, petitioners pointed out to the court that it was in error since one of the other excluded parcels referred to, Adventurer's Inn, actually was worth far more than petitioners' property (the owners of Adventurer's Inn were awarded more than $7.5 million for the taking of their property), the court adhered to its decision (A5-6).

Petitioners raised the same issues before the New York Court of Appeals which dismissed for lack of a "substantial constitutional question" (A3). Since such a dismissal amounts to a determination of the appeal on the merits by the Court of Appeals (R. Stern & E. Gressman, *Supreme Court Practice,* §6.21, at 445, n.53 [5th ed. 1978]. *Cf. Hicks v. Miranda,* 422 U.S. 332, 343-45 [1975]), the writ of certiorari is sought to be directed to that court.

REASONS FOR GRANTING THE WRIT.

I.

The New York courts have sanctioned conduct on the part of a condemnor which greatly erodes the right of owners to receive just compensation for their property. This decision raises significant problems which are likely to recur and which should be settled by this Court.

There is no dispute that petitioners were not paid just compensation for the taking of their property. Based upon the claim that they waived this constitutional right, petitioners were paid approximately 24% less than the value of their property on the date it was taken by the City of New York. It is petitioners' contention that the manner in which this waiver was extracted—in the form of the unfair penalty clause foisted upon petitioners—was clearly unconstitutional. Furthermore, the New York courts' approval of the City's unconscionable conduct in this case raises significant constitutional questions which should be resolved by this Court.

The City, through PDC, using the substantial leverage afforded it by virtue of its power of eminent domain, presented petitioners with the following difficult choice: (i) suffer the immediate taking of their valuable, ongoing golf-range amusement center or (ii) enter an agreement in which they could keep the property provided they dramatically redeveloped it to conform to the City's plans for an industrial park, and provided further that if, for whatever reason, the redevelopment was not carried out and the City chose later to condemn, petitioners forfeited their right to be fully compensated for their property.

From the City's point of view, the advantages of this proposed agreement were obvious. If private redevelopment were carried out to the City's satisfaction by petitioners, the City would have obtained its objectives while saving the costs and risks of acquisition. On the other hand, if petitioners failed in their attempt to meet the City's redevelopment demands, the City could acquire the property later at a bargain price. Moreover, the City, having frozen the price of petitioners' property at its January 1, 1972 level, had no obligation on its part. If it chose to do so, it could sit back and wait many years before condemning, secure in the knowledge that no matter how valuable petitioners' property might become, it could be had for the fixed price.

The disadvantages to petitioners were equally obvious. For the privilege of keeping their property, petitioners were required to redevelop while risking forfeiture of the right to just compensation if they failed to satisfy the City.

The unfairness of the arrangement also is underscored by the fact that whether petitioners' redevelopment proposal was satisfactory rested solely within the discretion of the City. Here, even after petitioners agreed to attempt redevelopment—and thus were bound to the City's demand that they forfeit just compensation—the City, for more than two years, refused to sign petitioners' letter of intent and refused to approve their redevelopment proposal. Finally, due to the sharp increase in construction costs during the extended period while the City refused to give the go-ahead, petitioners were forced to abandon their proposal without having had the opportunity even to start it. Then, when their property was taken, they were denied just compensation.*

Were petitioners and the City in equal bargaining positions, it is clear that such a one-sided agreement never would have been made. However, faced with the City's power of eminent domain, petitioners had no choice but to go along with the City's unreasonable demands if they were to have any chance at all to keep their property.

The holding below that, under such circumstances, petitioners validly waived their constitutional right to just compensation is contrary to established principles governing the waiver of such rights. In *Fuentes v. Shevin,* 407 U.S. 67, 94 at n. 31 (1972), this Court stated:

> "In the civil area, the Court has said that '[w]e do not presume acquiescence in the loss of fundamental rights.' *Ohio Bell Tel. Co. v. Public Utilities Comm'n,* 301 US 292, 307. Indeed, in the civil no less than the criminal area, 'courts indulge every reasonable presumption against waiver.' *Aetna Ins. Co. v. Kennedy,* 301 US 389, 393."

Although a party may contractually waive a constitutional right, such a waiver will not be given effect when, as in the present case, it results from the unconscionable advantage enjoyed by one party over the other. In *O. H. Overmyer Co. v. Frick Co.,* 405 U.S. 174 (1972), this Court upheld a contractual waiver of due process finding,

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*The unfairness of the arrangement is further apparent in that while it fixed January 1, 1972 as the date for petitioners' property to be valued, the City did not condemn any properties until December 1, 1972, eleven months later. Thus, as a consequence of their attempts to meet PDC's demands and privately develop their property, petitioners were denied that which they would have received even if they had done nothing, *i.e.,* the valuation of their property as of December 1, 1972, or 9% more than they were paid.

under the circumstances there, that the waiver had been "voluntarily, intelligently and knowingly" given.* *Id.* at 187. In so holding, however, this Court noted that "This is not a case of unequal bargaining power or overreaching" *id.* at 186. The Court then wrote:

> "* * * where the contract is one of adhesion, where there is great disparity in bargaining power, and where the debtor receives nothing for the [waiver] provision, other legal consequences may ensue." 405 U.S. at 187.

That applies precisely to this case. The "great disparity in bargaining power" between the City and petitioners is clear, and the City, through its agent PDC, used its advantage, in the form of the threat of immediate condemnation, to induce petitioners to waive their right to just compensation. Such an exercise of the power of condemnation amounted to pure, unlawful coercion and must render the waiver extracted from petitioners unenforceable.

In upholding the waiver agreement here, the Appellate Division relied, in part, upon this Court's holding in *Albrecht v. United States,* 329 U.S. 599, 603 (1947), that the amount of just compensation may be the subject of a contractual agreement. However, that holding was based on the rule, recited in *Albrecht,* that

> "The Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. See *Danforth v. United States,* 308 U.S. 271."

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*In *Overmyer,* a civil case, this Court applied the standards applicable to waiver of constitutional rights in criminal proceedings, while not holding that these standards necessarily applied in civil cases. *Fuentes, supra,* 407 U.S. at 94.

The fixed valuation date clause here, however, was in no way an agreement fixing just compensation for the taking of Golf City. It was purely a penalty clause which undisputedly resulted in petitioners being paid far less than what would be just compensation for the taking of their property. The courts should not enforce such a penalty where, as here, it is applied as a result of the "unconscionable advantage" held by the City over petitioners. See *Foster v. Herley*, 491 F.2d 174, 176 (6th Cir. 1974).

The decision in this case has received national attention. See 24 *Just Compensation*, November, 1980 at pages 7-8. In view of the City's success, thus far, in the present case, it, as well as condemnors around the country who might plan industrial parks or other projects requiring redevelopment, will be encouraged to employ similar tactics. Other property owners faced with the threat of condemnation, will be induced to waive just compensation. Most susceptible to this sharp tactic will be owners with the most to lose by condemnation, *i.e.*, those who, like petitioners, own successful, ongoing businesses with good will value and which cannot be relocated with ease, if at all.

The unfair tactics employed by the City in this case, if permitted to stand, will seriously erode both the principle of just compensation and the confidence of citizens in their government. Where government claims to have a higher wisdom for the proper use of property and insists on taking it by its power of eminent domain, it must not seek, as the City did here, to pay a bargain price at the owner's expense.

In *Armstrong v. United States*, 364 U.S. 40, 49 (1960), this Court observed that the constitutional right to just compensation "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Petitioners here have been forced to bear far more than their fair share of the burden, first being induced to attempt privately to carry out the City's redevelopment plans, and then being denied just compensation when they were unable to satisfy the City in this regard and their property subsequently was taken. This result is unconscionable and should not be permitted to stand.

II.

The City's singling out of petitioners and requiring that they alone, out of 17 similarly situated property owners, waive their right to just compensation constituted arbitrary and unreasonable discrimination which violated petitioners' constitutional right to equal protection of the law.

The Fourteenth Amendment's guarantee of equal protection of the law means that the law shall be applied equally to all similarly situated persons. *Kentucky Finance Corp. v. Paramount Auto Exch. Corp.*, 262 U.S. 544, 550 (1923).

State action which results in different treatment of persons is unconstitutional if it is arbitrary; it cannot stand unless it is based on "some ground of difference having a fair and substantial relation to the object of the [action], so that all persons similarly circumstanced shall be treated alike." *Reed v. Reed*, 404 U.S. 71, 76 (1971), *quoting Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Clearly, the City's treatment of petitioners was unjustifiably discriminatory and violated their right to equal protection. Of the 17 owners whose properties were excluded from the December 1, 1972 taking by the City, petitioners were the *only ones* required by PDC to waive their right to full and just compensation and be bound to a penalty clause as the price for such an exclusion. Of all of the owners in College Point whose properties were taken, petitioners were the *only ones* paid less than the full value of their property as of the date of taking.

In addition to petitioners three other owners received exclusions from the 1972 taking and then had their property condemned in 1974. Two of these, Adventurer's Inn and Tully & DiNapoli, were excluded from the earlier taking on the basis of plans submitted to PDC, and were subsequently taken in 1974 because the former's plans were not approved and the latter's not carried out. The third parcel, owned by Marquette Cement, was deferred from taking until 1974 although no plans were ever submitted by its owner.

In contrast with its dealings with petitioners, PDC never demanded and never received agreement to a fixed valuation date from these owners as a condition for deferring the date of the taking of their properties and, unlike petitioners, these owners were paid for the full value of their property as of the date of taking.*

This conduct by the City, being arbitrary, unreasonable and patently unfair, falls well within the classic rule enunciated by this Court almost a century ago:

> "Though the law itself be fair on its face and impartial in appearance yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in

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*PDC requested only one other owner, Queens Structure Corporation to submit to a fixed valuation date, and Queens Structure never complied with that request. PDC nevertheless excluded its property from the December, 1972 taking, and all subsequent takings.

> similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." *Yick Wo v. Hopkins,* 118 U.S. 356, 373-374.

In holding that "no discriminatory treatment was practiced on petitioners and that the fixing of January 1, 1972 as the award date for Golf City was not arbitrary" (A18), the Appellate Division did not rely on the plainly meritless justifications for PDC's actions advanced by the City with respect to the four parcels situated most similarly to Golf City. Instead, the court focused on a single statement made at trial by PDC's executive director in an entirely different context, and from it drew erroneous conclusions not urged by the City or supported by the evidence.

While PDC's director, Richard Bernstein, was being cross examined with respect to the response PDC received as a result of its solicitation of development plans from landowners, the trial judge interjected and asked Bernstein whether PDC's efforts in this regard led "to any negotiations that were at all similar or comparable to the negotiations that went on between you and Golf City." Bernstein responded:

> "There was nothing at all of their scope of magnitude, your honor."

The Appellate Division somehow found that this statement indicated petitioners' property was worth far more than the other excluded properties and therefore justified the City's different treatment of petitioners (A17-18):

> "As to why the others were not asked to agree to the valuation award date of January 1, 1972, as [*were petitioners*]—or, if asked, did not comply—Bernstein testified as above noted, that none

> of them was of the 'scope of magnitude' of Golf City. *A fair inference is that the others were nowhere near the money value of [petitioners'] holdings."* (Emphasis added.)

There is no evidentiary basis for the Appellate Division to have drawn such an inference. Bernstein's "scope of magnitude" remark referred solely to PDC's *negotiations* with petitioners and not to the value of their property. More importantly, the inference drawn by the Appellate Division conclusively is rebutted by the undeniable fact that Adventurer's Inn, another large recreational property in the area that, like Golf City, was excluded from the December, 1972 taking and then condemned in 1974, *was worth far more than petitioners' property.* The various owners of Adventurer's Inn were awarded $7,528,222 for their property, *far more* than the $4,131,490 awarded claimants.* Decree, N.Y. Sup. Ct., Queens Co., entered July 18, 1979.

Even apart from its inaccuracy, the Appellate Division's conclusions in this regard legally are unsound. That is, even if Golf City were the most valuable property in the area, which it's not, this would provide no rational basis upon which to discriminate against petitioners and to require them alone to waive their right to just compensation.

Thus, the City's imposition of a 24% penalty solely on petitioners' condemnation award was arbitrary and unreasonably discriminatory and constituted a denial of petitioners' constitutional right to equal protection of the law.

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*On appeal, the Appellate Division *increased* the award to the owners of Adventurer's Inn by $240,833. 82 A.D.2d 829 (2d Dep't 1981). This, in turn, was affirmed by the New York Court of Appeals. ____ N.Y.2d ____ (April 1, 1982).

Conclusion.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York,
May 14, 1982.

Respectfully submitted,

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Appendix

81-2128

No.

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Appendix to Petition for a Writ of Certiorari to the Court of Appeals of the State of New York

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Opinion of the Court of Appeals, State of New York.

In the Matter of the CITY OF NEW YORK, Respondent-Appellant, Relative to Acquiring Title to Real Property for a Project Known as College Point Industrial Park Urban Renewal Project II, Stage III within the Area Bounded by 15th Avenue and Other Streets in the Borough of Queens. LEO MARINELLO *et al.*, Appellants-Respondents.

Argued April 29, 1981; decided June 9, 1981

SUMMARY

CROSS APPEALS from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered July 21, 1980, which unanimously modified, on the law, and, as modified, affirmed a second separate and partial final decree of the Supreme Court at Special Term (LEO BROWN J.), entered in Queens County in a condemnation proceeding, making awards for Damage Parcels 1, 2, 5 through 15 and 19. The modification consisted of increasing the amounts awarded to claimants Marinello and Saveth for plottage from 5% to 10%.

Matter of City of New York (Marinello), 76 AD2d 349, reversed.

APPEARANCES OF COUNSEL

Michael J. Greco, Thomas R. Newman, Ignatius John Melito and *Louis G. Adolfsen* for appellants-respondents.

Allen G. Schwartz, Corporation Counsel (Morris Einhorn and *Leonard Koerner* of counsel), for respondent-appellant.

OPINION OF THE COURT

MEMORANDUM.

On the appeal by the City of New York, the order of the Appellate Division, insofar as appealed from, should be reversed, with costs, and the matter remitted to the Appellate Division, Second Department, for a review of the facts.

Special Term awarded claimants a 5% value increment for plottage. The court noted that while the customary award for plottage is 10%, a lesser award was appropriate here because this parcel was so large that it was nearing the point of "maximum utility" and its value as an aggregate of lots was only slightly greater than the sum of the values of the individual lots it contained. The Appellate Division held that Special Term's 5% award was erroneous as a matter of law and modified by increasing the plottage award on the entire parcel on the basis of a purported "concession" by the city.

We cannot agree that the city conceded that a 10% value increment for plottage should be applied to the entire parcel. Rather, the city's appraiser stated that a 10% increment would be appropriate only if applied to the "net acreage" remaining after a deduction for streets which the appraiser viewed as necessary for development. The city's concession was predicated upon its appraiser's assumption that only such "net acreage" was entitled to a "plottage" award. This being so, it was error for the court below to increase the plottage award for the entire parcel from 5% to 10% on the basis of this "concession".

Nor do we believe that Special Term's award of a 5% increment for plottage on the entire parcel was erroneous as a matter of law. Hence, the Appellate Division's modification of that award "on the law" was improper. However, inasmuch as this court has no power to determine whether, as a factual matter, Special Term erred in awarding a 5% increment, we must remit the matter to the Appellate Division for a review of the facts. (CPLR 5613.)

The appeal taken as of right by claimants should be dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

Chief Judge COOKE and Judges JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER concur.

On claimants' appeal: Appeal dismissed, without costs.

On city's appeal: Order, insofar as appealed from, reversed, with costs, and matter remitted to the Appellate Division, Second Department, for further proceedings in accordance with the memorandum herein.

Decision of the Court of Appeals on Motion for Leave to Appeal.

2 Mo. No. 187

IN THE MATTER

OF

The Application of The City of New York &c., College Point Industrial Park Urban Renewal Project II, Stage III &c.

LEO MARINELLO, *et al.*,

Appellants,

& ano., &c.,

Claimant,

vs.

THE CITY OF NEW YORK,

Respondent.

Motion for leave to appeal denied with twenty dollars costs and necessary reproduction disbursements.

Feb. 25 1982

Order of the Appellate Division, Second Department on Motion for Reargument and for Leave to Appeal.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on December 21, 1981.

Hon. Leon D. Lazer,
Justice Presiding
Hon. Guy J. Mangano
Hon. John P. Cohalan, Jr.
Hon. Frank D. O'Connor
Associate Justices

◆

In the Matter of The City of New York.

LEO MARINELLO *et al.*,

Appellants;

et al.,

Claimant;

THE CITY OF NEW YORK,

Respondent.

◆

In the above entitled cause, the claimants Marinello and Saveth having moved for reargument of their appeal from portions of a second separate and partial final decree of the Supreme Court, Queens County, entered December 1, 1978, or in the alternative for leave to appeal to the Court of Appeals from the order of this court dated July 21, 1980, which determined said appeal;

Now, upon the papers filed in support of and in opposition to the motion, and the motion having been duly submitted and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the motion is hereby denied without costs or disbursements.

Enter:

IRVING N. SELKIN
Clerk of Appellate Division

Appellate Division Opinion, Dated July 21, 1980.

◆

In the Matter of the CITY OF NEW YORK, Respondent, Relative to Acquiring Title to Real Property for a Project Known as College Point Industrial Park Urban Renewal Project II, Stage III. LEO MARINELLO *et al.*, Appellants.

◆

Second Department, July 21, 1980

SUMMARY

APPEALS from so much of a second separate and partial final decree of the Supreme Court at Special Term (LEO BROWN, J.), entered December 1, 1978 in Queens County, as made awards for Damage Parcels 1, 2, 5 through 15 and 19.

APPEARANCES OF COUNSEL

Greco & Gottlieb (Michael J. Greco and *Siff & Newman, P.C.,* of counsel), for Leo Marinello and others, appellants.

Greco & Gottlieb (Michael J. Greco and *Robert S. Gottlieb* of counsel), for Tully & Di Napoli, Inc., appellant.

Allen G. Schwartz, Corporation Counsel (Isaac Salem and *Morris Einhorn* of counsel), for respondent.

OPINION OF THE COURT

COHALAN, J.

In this condemnation proceeding, the claimants[1] appeal from that portion of the second separate and partial final decree entered in the office of the Clerk of Queens County on December 1, 1978 which makes and contains an award for Damage Parcels Nos. 1, 2 and 5 through 15.

In the brief for claimants, they develop the issues of inadequacy of award, the date set for the fixation of the award, the issue of plottage, the discriminatory selectivity allegedly exhibited by the condemnor, and the denial of an increment for the property's double street frontage, all of which will be discussed, *infra*.

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[1] By court order, the claimant for the damage parcels at issue was changed from Westboro Industries, Inc., to its individual stockholders, namely, Leo Marinello, Leonard Marinello and Saul Saveth. We shall use the names of this corporation and the individuals interchangeably. We further note that claimant Tully & Di Napoli, Inc., has appealed from so much of the same decree as awarded it nominal damages for Damage Parcel No. 19. That award should be affirmed (see *Matter of City of New York [Tully & Di Napoli],* 73 AD2d 932). This opinion concerns only claimants Marinello and Saveth (Westboro).

The decree should be modified by increasing the award for plottage from 5% to 10%, or from $187,795 to $375,590, for a new total of $4,131,490 and, as so modified, affirmed, with costs.

The subject property is in the College Point area of Queens County. The project is known as College Point Industrial Park Urban Renewal Project II, Stage III. It consists of approximately 15 acres (653,200 square feet). Actual title to the premises vested in the City of New York (city) on June 25, 1974.

The claimants Marinello and Saveth are or were the sole stockholders of Westboro Industries, Inc. (Westboro), the owner of the fee.

The property is generally flat. It comprises 13 contiguous damage parcels. It is located on the northerly side of 20th Avenue, about 500 feet west of the Whitestone Expressway in Queens County. It fronts on four streets, only two of which are open, the others being mapped as "paper" streets. The land, referred to as Golf City, is improved with, *inter alia,* a golf driving range, a "pro" shop, a small, one-story restaurant, two miniature golf courses and a baseball batting range.

The undisputed fact pattern reveals that in September, 1967, the City Planning Commission designated approximately 560 acres in the area as appropriate for urban renewal (see General Municipal Law, art 15, and especially §504).

The city planned to acquire the 560-acre site (some of which it already owned) as an industrial park, thereby hoping to create thousands of blue collar jobs while generating tax dollars. Following approval of an initial phase development of some 60 acres of the site in 1969, the Board of Estimate, on September 16, 1971, approved Urban Renewal Plan II (URP) for second phase development. Claimants' parcel, together with numerous others, was included in this resolution for acquisition and redevelopment. On January 13, 1972, the Board of Estimate authorized acquisition of the parcels, in accordance with the URP. The actual municipal agency responsible for carrying out the plan and overseeing the development of the College Point area into the contemplated industrial park was the New York Public Development Corporation (PDC). Testifying on behalf of the PDC, Richard Bernstein, its executive director, described the PDC as a not-for-profit, quasi-public corporation, established to assist the city in the development of industrial parks and endowed with wide decision making powers as to which parcels would be taken and which excluded. The URP was, in fact, developed primarily by the PDC in co-operation with the city. Bernstein further stated that the plan provided a mechanism by which parcels designated for acquisition could be excluded from condemnation, where, *inter alia,* they could be satisfactorily redeveloped by their owners for uses in conformity with the plan. As formally proposed to the Board of Estimate in a document dated May 21, 1971, it was noted that it "is the intent of the City of New York to achieve maximum feasible private development and redevelopment." Such redevelopment was mutually beneficial since the city thereby would save the cost of a condemnation award while, at the same time, permitting the owners to retain possession of their real property. The May, 1971 proposal provided that to obtain exclusion of the property from city acquisition, an owner had to submit what was termed an "acceptable proposal" to PDC within three months of the soon-to-be effective date of the approval of the URP, i.e., September 16, 1971, together with evidence of financial ability to carry out the plan. PDC was to review each submission, and if satisfied as to conformity with the plan (as well as the applicant's ability to implement it), could recommend to the city that the parcel be temporarily or permanently excluded from condemnation. With respect to the Golf City parcel, Westboro strongly desired that the parcel be excluded from the taking and accordingly sought a satisfactory redevelopment proposal because its then recreational use was incompatible with the plan. After several tentative submissions, Westboro proposed a multilevel development encompassing the subject site's 15 acres (plus the anticipated acquisition from the city of 11 contiguous acres), providing industrial use of the first level, commercial use on the second and a restaurant and golf driving range on the roof. The proposal was submitted in a letter of intent dated September 9, 1971, from Westboro to the PDC and incorporated the terms requested by the *PDC;* specifically, the letter included the following paragraph: "It is further understood and agreed that appropriate provision will be made upon approval of the sales transaction to us and have binding guarantees to provide for our completion of the project. We further agree to the adoption of the request by the City of the condemnation award of the land and for any present improvement existing as of the date of such condemnation to be based upon the value as of January 1, 1972 if, in the event in the future our project would fail and the City would be required to condemn our parcel for other land redevelopment use in the College Point Industrial Park. Any subsequent improvement with respect to our proposed project is to be valued as of date of condemnation. We agree to this method because we are convinced we are able to build, and develop to completion, our project concept."

While Westboro recognized that the proposal "does not in any way bind the City of New York, and its agencies or the Board of Estimate, or PDC", the letter closed with a request that if "satisfactory to you, kindly indicate acceptance by signing the copy enclosed herewith and return to the undersigned." It is conceded by the parties that the letter was never signed by the PDC nor returned to Westboro. Bernstein testified that PDC's board of directors decided not to sign the letter or take further steps until Golf City provided evidence of available financing and marketability of the project. Nevertheless, as an indication of acceptance, the board of directors of the PDC did authorize the executive director to temporarily exclude the Westboro parcel from the imminent condemnation of the land. The initial appropriation of the vast majority of parcels occurred on December 1, 1972 at which time Golf City (as well as 16 other parcels) was excluded. Golf City was notified of its "interim exclusion" in a letter from PDC dated October 12, 1972, the PDC noting that it took such action because "you [Westboro] agreed to accept a condemnation award based upon value as of January 1, 1972 in the event of failure of your project necessitating future condemnation". Addressing itself to Westboro's request for a signed "acceptance" of its September 9, 1971 letter of intent, the letter, signed by Bernstein, continued that Westboro's "re-development plan has not been submitted with sufficient definition for the City or our Board to make a realistic judgment. Thus the [PDC] and the City *have never been in a position to formally act upon or approve* your proposal of September 9, 1971" (emphasis added).

The PDC continued to assist Golf City in the latter's efforts to bring the proposal to fruition. As one specific instance, it attempted to strengthen Golf City's position by introducing its principals to Peerage Properties, Inc., a company with a proven record for development and financing. Claimants, on their part, obtained the services of an architect to draw detailed plans and specifications of the proposed Golf City development, and thereby expended money as a consequence. There was no question that both sides acted in good faith throughout; nor is there any question that PDC relied on the clause in the September 9, 1971 letter that in the event of ultimate condemnation January 1, 1972 would be recognized as the award of payments date.

In this regard, it is significant that between September 9, 1971 and October 12, 1972, nothing appears in the record to indicate Westboro's repudiation or disavowal of January 1, 1972 as the award date if condemnation occurred. On the October date, PDC (by Bernstein) wrote to Saveth (chairman of the board of Westboro) relative to Golf City. The letter included the following paragraphs:

> "For the record, our office was pleased to play the role of 'honest broker' to introduce Peerage to you in an attempt to possibly strengthen your preliminary proposals for re-development of your parcel by way of joint venture.
>
> * * *
>
> "To date we have recommended exclusion of your property in order to give you every reasonable opportunity to refine and implement your plans in accordance with the Urban Renewal Plan. We have recommended such interim exclusion since you agreed to accept a condemnation award based upon value as of January 1, 1972 in the event of failure of your project necessitating future condemnation by the City."

Not until December 29, 1972, did Westboro respond in writing to the PDC letter of October 12 of that year. It was signed by Saveth and stated, in pertinent part:

> "In reviewing your letter of October 12, 1972, I wish to thank you for playing the roll *[sic]* of honest broker, and I trust that it works out favorably. However, we still have firm intentions of proceeding with the Golf City redevelopment plan under any circumstances. I have instructed my architect, Mr. Joseph Trapani, to proceed with preliminary borings, based on Study #6, which was the last submission to your office.
>
> "If it is not putting the cart before the horse, we are willing to go to contract on the additional land we require, at your convenience. We fully intend to do this deal and be assured that we will satisfy your people as to the financial responsibilities and the ability to perform."

There was other correspondence between the parties relative to the Golf City development, but none of the letters made any mention of the award value date. Finally, on January 28, 1974, Westboro (by Saveth) threw in the towel, and in a one-paragraph letter addressed to PDC stated: "As per meeting at your office last week, we hereby confirm that you proceed with the condemnation of our property located in the College Point Industrial Park."

The very next day, January 29, 1974, Saveth wrote a three-paragraph letter to PDC, the final two of which read:

> "It now appears that it would be economically unfeasible to satisfy the requirements of your department and our own goals for the development of this property.
>
> "Therefore, although we do not welcome it, we will not oppose the condemnation of the above property, retaining whatever rights we have to obtain just compensation for same."

A third letter[2] on the subject, dated January 30, 1974, was addressed to PDC by Saul Saveth. The second paragraph (of two) contained the intelligence that: "It now appears that it would be economically unfeasible to enter into such a redevelopment project on our own account since one of our principals has had a change in his personal situation."

The necessary legal proceedings then followed, culminating in the actual title vesting date of June 25, 1974.

It was not until the condemnation hearings and the post-hearing submission of briefs that the claimants attempted to repudiate the assurance in the September 9, 1971 letter that January 1, 1972 would mark the valuation date.

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[2] The three letters were written at the request of PDC, the second and third constituting amplifications of the first.

[1] Claimants' position is that there was no binding contract between the parties, that there never was a meeting of the minds, and that there was no acceptance by the city because it had failed to sign and return the September 9, 1971 letter. Special Term held there was a unilateral contract because PDC by excluding Golf City from condemnation (at least temporarily) caused the contract to reach fruition. As Special Term further pointed out, the temporary forbearance to condemn and the waiver by Westboro was sufficient consideration for a binding contract (see *Jemzura v Jemzura,* 36 NY2d 496, 504; *Ryerson & Son v A. V. O'Donnell, Inc.,* 279 NY 109, 115; *Muir v Greene,* 191 NY 201, 204; *Strong v Sheffield,* 144 NY 392, 394-395; *Hamer v Sidway,* 124 NY 538, 545).

[2] There is nothing arcane or recondite about a waiver. It is defined as "a voluntary and intentional relinquishment or abandonment of a known existing legal right, advantage, benefit, claim, or privilege, which except for such waiver the party would have enjoyed" (21 NY Jur, Estoppel, Ratification and Waiver, §88, p 126). So long as it is not unconstitutional or violative of public policy, it will be enforced.

There is no prohibition against waiver in either the former Condemnation Law, which was in effect when the proceedings herein were commenced or in the Eminent Domain Procedure Law (L 1977, ch 839, eff July 1, 1978).

At bar, there is no suggestion in the record that Saveth, as a 50% stockholder of Westboro and chairman of its board of directors, did not know what he was doing when he signed the September 9, 1971 letter. Indeed, in response to the court's direct questions if he knew what he was doing when he signed the various papers, Saveth answered in the affirmative.

Waiver has been invoked on countless occasions and in many and varied phases of the law.

As examples, we know that in criminal proceedings by statute (CPL 320.10, subd 1) one may waive trial by jury; or to be present as a defendant at a trial (*People v Epps,* 37 NY2d 343).

In the field of education, it was recently held that tenure may be waived (*Matter of Abramovich v Board of Educ.,* 46 NY2d 450, cert den 444 US 845), so long as it is done intelligently and voluntarily (see, also, *Matter of Feinerman v Board of Coop. Educational Servs. of Nassau County,* 48 NY2d 491). *Matter of Meachem v New York Cent. R. R. Co.* (8 NY2d 293) is authority for waiver in a workers' compensation matter. In contract actions, the doctrine of waiver has been applied (*Davison v Klaess,* 280 NY 252). Waivers are customarily employed in proceedings in Surrogate's Court (*Matter of Kellas,* 40 NYS2d 655, affd 267 App Div 924, affd 293 NY 908), and so on through the gamut of legal actions and equitable proceedings.

Research has failed to uncover any reported cases of a similar nature on waiver in condemnation proceedings in New York State except *Rockaway Peninsula Corp. v State of New York* (47 Misc 2d 114, mod 29 AD2d 997) which we do not find to be applicable to the factual situation at bar. There, the authorities "permitted" the claimant to build on a paper street in consideration of waiving an award for the value of any improvements placed thereon. The claimant could have obtained in a CPLR article 78 proceeding what it claims it was forced to agree to. At bar, the action of PDC was an act of grace. It extended to Westboro the opportunity to prove that it could make a go of its recreational facilities and deferred any question of condemnation to give it that chance. Further, PDC agreed to and honored the clause in the Westboro letter of September 9, 1971 that "[a]ny subsequent improvement with respect to our proposed project is to be valued as of date of condemnation."[3]

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[3] Claimants settled their claims for fixtures and improvements for $850,000, aside and apart from the land value award of approximately $3,950,000.

Moreover, the court has had its attention called to a number of cases in the Federal jurisdiction wherein the question of just compensation "has been agreed on" in contract matters. Thus, as noted in one of them, *Albrecht v United States* (329 US 599, 603): "The Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. See *Danforth v. United States,* 308 U.S. 271. Nor does it bar them from embodying that agreement as a contract, as was done here. And certainly where a party to such a contract stands upon its terms to enforce them for his own advantage, he cannot at the same time successfully disavow those terms so far as he conceives them to be to his disadvantage."

[1] Applying that statement to the instant case, can anyone seriously argue that PDC would have granted a carte blanche permanent deferment to Westboro without receiving a *quid pro quo* relative to the award date for the parcel if condemnation became necessary? We think not. Further on this point, we note that "[t]here is no doubt that an owner of land taken by eminent domain may waive his right to compensation or damages, or be estopped to make such claim" (see 3 Nichols, Eminent Domain [rev 3d ed], § 8.82; *Matter of City of New York [Northern Blvd.]*, 258 NY 136, modfg 232 App Div 830). In *Northern Blvd.* (p 155) the court noted, by CARDOZO, Ch. J., that: "[T]he grantee was under a duty to convey the damage parcel to the city without compensation if required for the boulevard."

Logically, it would follow that if an owner may waive all consideration or be estopped from making any claim to it, he may waive or be estopped from making any claim for a portion thereof. New York Jurisprudence notes (vol 21, Estoppel, Ratification, and Waiver, § 91, p 128) that: "A party may waive a rule of law or a statute, or even a constitutional provision enacted for his benefit or protection, where it is exclusively a matter of private right, and where no considerations of public policy or morals are involved" (see *Selzer v Baker*, 295 NY 145; *Rosen v New York City Teachers' Retirement Bd.*, 282 App Div 216, affd 306 NY 625). On this point we hold, therefore, that the instant case is one involving solely a "matter of private right" with "no considerations of public policy * * * involved".

We turn our attention now to the argument of the claimants that the PDC's allegedly discriminatory treatment of them by imposing a so-called arbitrary condition, namely that they accept a valuation date for their property other than the title vesting date of June 25, 1974, was a denial of equal protection and therefore against public policy.

It will be recalled that Bernstein testified for the PDC as to parcels excluded from immediate condemnation. As to parcels other than Golf City that were excluded, he stated: "There was nothing at all of their scope of magnitude, your Honor." On a later date, he testified as to 17 parcels that had been excluded initially from condemnation and explained the rationale of exclusion for each. A list of the 17 parcels is in evidence.

As to the first seven, he noted that they were small parcels along an open street and were already being devoted to industrial use or committed to that purpose. They were not condemned for that reason. Five other parcels already conformed to the URP but by error had been designated for acquisition because of inadequate information furnished as to their ownership and use. The final five included Westboro and did not conform to the URP.

In each instance, Bernstein gave a cogent reason for inclusion or exclusion and pointed out that they were condemned—if condemned—no later than June 25, 1974.

As to why the others were not asked to agree to the valuation award date of January 1, 1972, as was Westboro—or, if asked, did not comply—Bernstein testified as above noted, that none of them was of the "scope of magnitude" of Golf City. A fair inference is that the others were nowhere near the money value of Westboro's holdings.

Thus, we find that no discriminatory treatment was practiced on the claimants and that the fixing of January 1, 1972 as the award date for Golf City was not arbitrary.

On the issue of plottage, we agree with claimants that they are entitled to a 10% rather than a 5% increment figure.

In Black's Law Dictionary (4th ed, p 1314), plottage is defined as: "A term used in appraising land values and particularly in eminent domain proceedings, to designate the additional value given to city lots by the fact that they are contiguous, which enables the owner to utilize them as large blocks of land" (citing *Matter of Erlanger v New York Theatre Co.*, 206 App Div 148; and *People ex rel. Loeser & Co. v Goldfogle,* 220 App Div 326, affd as to plottage 249 NY 284). On the facts before us, and in view of the city's concession of a 10% plottage increment, we have increased the award accordingly. We do not agree, as reasoned by Special Term, that the size of Golf City had reached the area of maximum utility at which point the law of diminishing returns would set in.

The final arrow in claimants' quiver of arguments concerns itself with "the customary increment for their property's double street footage". We adopt the reasoning of Special Term in finding that such double frontage as exists is insignificant in nature and does not add to the value of the subject property.

The decree should be modified accordingly.

LAZER, J.P., MANGANO and O'CONNOR, JJ., concur.

Second separate and partial final decree of the Supreme Court, Queens County, entered December 1, 1978, modified, on the law, by increasing the amount awarded claimants Marinello and Saveth for plottage from 5% to 10% (or from $187,795 to $375,590) and the total award to $4,131,490. As so modified, said decree affirmed insofar as appealed from, with costs to appellants Marinello and Saveth payable by the city.

Order of the Appellate Division—Second Department, dated July 21, 1980.

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on July 21, 1980.

Hon. Leon D. Lazer, Justice Presiding
Hon. Guy J. Mangano,
Hon. John P. Cohalan, Jr.,
Hon. Frank D. O'Connor. Associate Justices

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In the Matter of the City of New York
(College Poing Industrial Park Urban
Renewal Project II, Stage III).

LEO MARINELLO *et al.*,

Appellants,

THE CITY OF NEW YORK,

Respondent.

◆

In the above entitled cause, the above named Leo Marinello *et al.*, claimants, having appealed to this court from so much of a second separate and partial final decree of the Supreme Court, Queens County, entered December 1, 1978, as made awards for Damage Parcels 1, 2, 5 through 15 and 19; and the said appeals having been argued by Michael J. Greco, Esq., of counsel for the appellants and argued by Isaac Salem, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon OPINION by COHALAN, J., and this court's decision slip heretofore filed and made a part hereof, it is

ORDERED that the second and partial final decree appealed from is hereby modified, on the law, by increasing the amount awarded claimants Marinello and Saveth for plottage from 5% to 10% (or from $187,795 to $375,590) and the total award to $4,131,490; and, as so modified, the said decree insofar as appealed from is hereby unanimously affirmed, with costs to appellants Marinello and Saveth payable by the city.

LAZER, J.P., MANGANO and O'CONNOR, JJ., concur in the opinion of Mr. Justice COHALAN.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division.

Portions of Memorandum Decision Relating to Petitioner's Property.

SUPREME COURT,

QUEENS COUNTY,

Special Term, Part 4-A.

[SAME TITLE.]

By: Brown, J. Index No. 6439/74

Dated: June 1, 1977

This is a proceeding in eminent domain brought by the City of New York (the City) to acquire title to certain real property for a project known as College Point Industrial Park Urban Renewal Project II, Stage III, within an area bounded generally by 15th Avenue, 20th Avenue, Old Salt Pond, 134th Street, 141st Street, Whitestone Expressway, Ulmer Street, Stratton Avenue and one half of the street beds of 130th Street, 131st Street and 30th Avenue adjacent to Block 4360, in the Borough of Queens, City of New York including title to street areas where title in fee for such purposes has not been heretofore acquired by the City. Title vested in the City on June 25, 1974. The trial extended over a period of several months. The statutory view and several subsequent inspections were made by the court.

This taking involves 19 damage parcels. Damage Parcel Nos. 1, 2, and 5 through 15 (hereafter Golf City) were owned by Westboro Industries, Inc. (Westboro). Damage Parcel No. 19 was owned by Tully & DiNapoli, Inc.

The testimony submitted by the City established that Damage Parcels Nos. 3 and 4 are owned by the City. Damage Parcels Nos. 16, 17 and 18 are owned by parties who have not appeared and have failed to submit proof of title. Consequently, awards for Damage Parcels Nos. 16, 17 and 18 should each be made to an "unknown owner".

The only proof of value with respect to Damage Parcels Nos. 3, 4, 16, 17 and 18 was furnished by the City's appraiser. The City's proof is uncontradicted. Hence, awards are made for those damage parcels in the amounts as estimated by the City's appraiser as follows:

Damage Parcel No. 3	$19,700
Damage Parcel No. 4	$1.00
Damage Parcel No. 16	$1.00
Damage Parcels No. 17 and 18	$2.00

With respect to Damage Parcels Nos. 1, 2, and 5 through 15, (Golf City), there is a basic issue to be resolved by the court concerning the date to be used for the purpose of valuation. The City contends that the claimant has agreed to a valuation date of January 1, 1972, rather than the title vesting date of June 25, 1974. The determination of this question will substantially affect the fixation of values and awards for the various parcels involved after giving due consideration to the usual factors affecting value and the awards to be made to claimants.

That issue will now be considered.

I. THE VALUATION DATE

A hearing on the issue with respect to the date to be used for the purpose of the valuation of Golf City was held before this court and from the credible evidence adduced at the hearing the court finds the following facts.

The Public Development Corporation of the City of New York (PDC) was established to develop areas of the City of New York as industrial parks. One area selected by PDC for development was the College Point section of Queens, which included the parcels here in issue. In addition to allowing for exemption from taking those properties which were already developed in a manner conforming to PDC's plans for the area, the Urban Renewal Plan also permitted PDC to recommend the temporary exclusion from condemnation any property in the area which required redevelopment if the owner of that property submitted a proposal for a project which PDC considered would advance the goal of increasing the industrial development in the area.

In a letter to PDC dated September 9, 1971, Westboro outlined its proposed project for the industrial and commercial redevelopment of Golf City. The letter indicated that the claimant needed additional land for its project and that it would be willing to purchase that land from the City at a designated price; that it would agree to reimburse PDC for its reasonable expenses involved in the land transfer, and that nothing included in the proposal was to be binding on the City of New York, its agencies, the Board of Estimate, or PDC. The letter also stated the following paragraph 2 on page 4:

> "We further agree to the adoption of the request by the City of the condemnation award of the land and for any present improvement existing as of the date of such condemnation to be based upon the value as of January 1, 1972 if, in the event in the future our project would fail and the City would be required to condemn our parcel for other land redevelopment use in the College Point Industrial Park. Any subsequent improvement with respect to our proposed project is to be valued as of date of

> condemnation. We agree to this method because we are convinced we are able to build, and develop to completion, our project concept."

The letter closed by noting that if it was satisfactory, acceptance should be indicated by signing and returning a copy. No one from PDC ever signed and returned the letter.

The testimony of Richard K. Bernstein, Executive Director of PDC, established that when the PDC board reviewed the letter it was receptive to the proposed project but felt it could not give its approval until Westboro provided documentary evidence that financing was available. The board directed Mr. Bernstein to continue negotiating with Westboro and to consummate the transaction when Westboro's financial capability was sufficiently demonstrated. In order to give Westboro reasonable time and opportunity to refine its plans and demonstrate that financing was available and in accordance with Westboro's offer, PDC recommended to the Board of Estimate that Golf City should be temporarily excluded from the imminent taking. Thus, although it was upon the recommendation of PDC that the Board of Estimate in January, 1972 authorized Golf City to be acquired by condemnation, the title vesting to occur on December 1, 1972, it was also due to the recommendation of PDC that in the latter part of 1972 Golf City was temporarily excluded from the taking by virtue of the omission of its block and lot numbers from the authorization.

Despite the continuing good faith efforts on the part of Westboro to launch the project, the plan was never consummated due to Westboro's failure to document that financing was available. In a letter of January 29, 1974, Westboro finally informed PDC that it was not economically feasible to continue with the plan. Thereafter, Golf City was condemned and titled vested in the City on June 25, 1974.

Westboro takes the position that it is entitled to the value of the property on the date of the taking, that is, June 25, 1974. It contends that the statement in the letter to the effect that it would agree to a January 1, 1972 valuation date if the project failed was only part of its proposal for a formal contract that both parties contemplated entering into, but which was ultimately never written or executed. Moreover, Westboro argues that the letter could not have been a contract since it specifically stated that it was not to be binding on the City; and if it was an offer, it was not accepted because PDC failed to execute and return the letter. Additionally, Westboro claims that if January 1, 1972 is held to be the valuation date, it would be deprived of its constitutional right to just compensation.

(a)

The first issue to be determined is with respect to the intention of the claimant when the above quoted portion of the letter in issue was written. Although it is alleged by claimant that it was not its intention by the letter of September 9, 1971 to agree to a January 1, 1972 valuation date but rather just to have such an agreement put into a formal contract, the facts in this case belie that claim. For one thing, it is clear that without the temporary exclusion from what it knew would be an imminent taking, Westboro would not have had time to complete acceptable plans for the project. The letter and the negotiations which led to it were instinct with the understanding that the proposal to accept January 1, 1972 as the valuation date would be in exchange for the temporary exclusion of Golf City from the taking. The statement in the letter cannot be interpreted in any other way. Additional evidence of Westboro's intent was the lack of a protest to that portion of PDC's letter of October 12, 1972 which expressly stated that PDC had recommended interim exclusion relying on Westboro's agreement in the letter of September 9, 1971 to accept a condemnation award based upon the value of the parcel as of January 1, 1972. In fact, Westboro's reply of December 29, 1972, which mentions reviewing PDC's letter of October 12, 1972, completely omits any mention of the valuation date.

(b)

The second issue presented is whether the portion of the letter in question resulted in a binding contract between the parties that January 1, 1972 would be the valuation date if the project failed and condemnation ensued. Unless parties to a bilateral contract are bound so that either can sue for breach, neither is bound. (*Topken, Loring, & Schwartz Inc. v. Schwartz,* 249 N.Y. 206, 210). Thus, since the letter of September 9, 1971 provided that it would not be binding on the City, its agencies, the Board of Estimate or the PDC, it is clear that the letter standing alone cannot be considered a contract binding on Westboro.

A bilateral agreement which fails as a contract for lack of mutuality of obligation may, however, by performance on one side become a valid and irrevocable unilateral contract (*Marie* v. *Garrison,* 83 N.Y. 14, 26; see 6 Encyclopedia Law, N.Y. Contracts §§229, 446). "A promise void when made for want of mutuality of obligation becomes valid and binding upon the performance by the promisee of that in consideration of which such promise was made." (*Baum* v. *Beacon Feeds, Beacon Div. of Textron, Inc.,* 31 A D 2d 734.) In *Bisbing* v. *Sterling Precision Corp.,* (34 A D 2d 427) the court held: "The doing of an act by the promisee which he need not have done unless he chose, but being done at the instigation of the promisor, completes the contract and makes the promise binding. (See 1 Williston Contracts [3d ed.] § 13; *White* v. *Baxter,* 71 N.Y. 254, 259; Matter of Larney, 148 Misc. 871, 874-878.)" (Id. at 429; see *Richman* v. *Brookhaven Servicing Corp.* 80 Misc. 2d 563.) The statement in the letter agreeing to the January 1, 1972 valuation date was in effect an offer made by Westboro, and PDC's actions in recommending exclusion of the property from the taking, the temporary exclusion of the property by the Board of Estimate, along with PDC's continuing good faith efforts in attempting to aid the claimant in launching its project, were at once the acceptance of the offer and consideration for the promise.

What Westboro clearly sought here was an act, namely, the exclusion of Golf City from the taking so as to give it the opportunity of bringing its proposed project to fruition. The performance of that act by PDC resulted in a binding contract notwithstanding the fact that PDC had not theretofore promised to do so. "Defendant asked, not for a promise, but for an act, the procurement of a sponsor, and a valid contract resulted when plaintiffs performed that act, even if they had not promised to do the act." (*Burr* v. *American National Theatre & Academy,* 103 N.Y.S. 2d 589, 591 [and cases there cited] affd. 278 App. Div 908; see 17 C.J.S., Contracts, § 41 [d], p. 668 *et seq.*).

There can be no doubt that the City had the legal right to take Golf City by the exercise of eminent domain. In fact, as already pointed out, the City's Board of Estimate had included Golf City in its authorization made in January, 1972. When it was excluded from the taking, this was an act of forbearance on the part of the City and a waiver of its legal right. Forbearance and such a waiver by the promisee is sufficient consideration for a binding contract. (*Jemzura* v. *Jemzura,* 36 N Y 2d 496, 504; *Joseph T. Ryerson & Son, Inc.* v. *A. V. O'Donnell, Inc.,* 279 N.Y.

109, 115; *Muir* v. *Greene,* 191 N.Y. 201, 204; *Strong* v. *Sheffield,* 144 N.Y. 392, 394-95; *Hamer* v. *Sidway,* 124 N.Y. 538, 545.)

Moreover, when the promissor has received the benefits for which he bargained, it is not a valid argument now to claim that the promissee was not bound by contract to perform the act constituting the acceptance (See 6 Encyclopedia Law, N.Y. Contracts, §446). In this instance, Golf City was excluded, giving Westboro time to develop plans acceptable to PDC. In addition, during the period between December 1, 1972, when title would have vested in the City had Golf City not been temporarily excluded, and June 25, 1974, when title ultimately did vest in the City, Westboro was able to continue to run its amusement business on this property, presumably at a profit.

(c)

The final issue for determination is whether making January 1, 1972 the date for valuation purposes is, in this instance, constitutional.

When property is taken by eminent domain the owner of the property is entitled to compensation as a matter of constitutional right. (N.Y. Const, Art. I, § 7; *Matter of Board of Water Supply of New York,* 277 N.Y. 452, 456; *Evelyn Building Corp.* v. *City of New York,* 257 N.Y. 501, 511; *County of Erie* v. *Fridenberg,* 221 N.Y. 389, 392; see 3 Nichols, Eminent Domain [rev. 3d ed.], § 8.1 [2].) Although "just" compensation is usually measured by reference to the fair market value at the date of the taking (*Chester Litho, Inc.* v. *Palisades Interstate Park Comm,* 27 N Y 2d 323, 325; *Keator* v. *State of New York,* 23 N Y 2d 337, 339; *Wolfe* v. *State of New York,* 22 N Y 2d 292, 295; *Matter of Board of Water Supply of New York, supra*), what is "just" is determined by equitable principles and each case must be considered in light of its own facts (see 19 N.Y. Jur., Eminent Domain, § 138). Here, Westboro's offer to take an award for its property "based upon the value as of January 1, 1972" was in reality an offer to take a lesser amount than a future condemnation might yield. This was perfectly apparent to the parties at the time. There could be no other reason for PDC's request of Westboro to make the offer to take an earlier valuation date. Furthermore, since PDC's program was the development of the College Point area as an industrial park, it would follow that land values there would be likely to increase. Indeed, this is just what happened; both Westboro's and the City's appraisers have testified to this. It is well established that the owner of land may waive receiving *any* compensation whatever for the taking of his property. "There is no doubt that an owner of land taken by eminent domain may waive his right to compensation or damages, or be estopped to make such claim." (See 3 Nichols, Eminent Domain [rev. 3d ed.] § 8.82, p. 248). If an owner may waive *all* compensation or be estopped from making any claim for it, then surely, *a fortiori,* he may waive or be estopped from making any claim for part.

At bar, the court finds that an agreement between the condemnor and the claimant to set the valuation date on a date prior to the date of title vesting is in actuality, as stated above, an agreement relating to the amount of an award for the value of the land. Constitutional provisions do not prevent such an agreement (see 3 Nichols, Eminent Domain [rev. 3d ed.] § 8.72). The court accordingly finds that to hold January 1, 1972 as the valuation date does not deprive claimant of its right to just compensation.

In conclusion, the court holds that with respect to the Golf City parcels the valuation date is January 1, 1972.

An issue is also presented as to what theory of valuation is applicable to land lying in the bed of streets that are mapped but not legally opened. Attention will now be given to resolving that issue.

II. VALUATION OF MAPPED STREETS

For many years the City and its predecessors have had authority by statutory and charter provisions to lay out and plot on an official or topographical City map the lines of proposed streets. (See General City Law, §§26, 29; *Scheibel* v. *O'Brien,* 230 N.Y. 277; *Di Biasi* v. *City of New York,* 19 A D 2d 323, affd. 14 N Y 2d 711.) In the Golf City site there were a number of such proposed streets (so-called "paper streets") consisting of parts of 138th, 139th, 140th and 141st Streets, with a total area of 191,648 sq. ft.

The claimant's appraiser estimates the same square foot unit value for the entire area of Golf City. The City's appraiser, however, estimates the value of the land outside of the mapped street areas at $6.50 a square foot and the land in the bed of the mapped streets at $2.175 a square foot. He gets this by dividing the incremental value by the mapped street area ($417,000 divided by 191,648 sq. ft.), stating that "[t]he incremental value is attributable to the streets, which actually produce these increments" (City's Exh. 25, p. 11).

The City makes no claim that the parcels or portions of them in the beds of the mapped street were in any way burdened with existing public or private street easements, nor is there any evidence in the record that would support such a claim. The question presented is whether compensation for the property taken should be made on the basis of a depreciation in value, compared to the value given to the remainder of the property, owing to the contemplated street use as evidenced by the mapping.

It is now clear that where, as here, property in the bed of a mapped street is taken by eminent domain and the property is not burdened with public or private street easements, the owner of the property is entitled to an award upon a full fee basis. (*Matter of City of New York [Sharnack]*, 23 A D 2d 687, affd. 17 N.Y. 2d 746; *Matter of City of New York [Avenue K]*, 250 App. Div. 137, affd. 274 N.Y. 503; *Matter of West 229th Street,* 135 Misc. 710, affd. 235 App. Div. 608, affd. 259 N.Y. 647.)

In *Matter of City of New York [Sharnack] (supra),* a condemnation proceeding, the trial court had made nominal awards for property in the beds of mapped streets. In reversing this determination, the Appellate Division of this Department held:

> "The award for the parcels should be on a full fee basis. They were not burdened with any easement. The fact that the proposed street and avenue were laid out in a city topographical map, in itself, is without significance (*Matter of City of New York [Wood]*, 200 N.Y. 536, 542, 543; *Matter of Opening of Hamilton Street,* 144 App. Div. 702, 705, 706.) As proved by the testimony of a city witness, who is one of the City engineers, it is common for mapped lines of proposed streets to be withdrawn." (*Matter of City of New York [Sharnack], supra* at 687.)

The City's appraiser further took the position that in a tract of the size of Golf City 20% to 30% of the site would have to be set aside for public streets; he actually took 29.34% of the gross area (i.e., 191,648 sq. ft.). This position is without merit. Since the highest and best use of the property according to this appraiser was its present use, that is, as a recreation and amusement center, obviously no public street would be laid out within it. Whatever walkways were to be constructed would constitute necessary accessories to the use to which the property was devoted.

It is clear that the application of the City's theory of valuation substantially reduces the value of the Golf City property. To penalize the claimant in this way may result in the taking of property without due process and without making just compensation. (See *People ex rel. New York Central & Hudson River Railroad Company* v. *Priest,* 206 N.Y. 274; *Forster* v. *Scott,* 136 N.Y. 577; *Lutheran Church in America* v. *City of New York,* 35 N Y 2d 121; cf. *Matter of Keystone Associates* v. *Moerdler,* 19 N Y 2d 78.)

It follows that the award for Golf City, including the lands lying in the beds of mapped streets, "should be on a full fee basis". (*Matter of City of New York [Sharnack], supra.*)

Consideration will now be given to what the amount of the awards for the property taken should be.

III. VALUATION AND AWARDS

A. Comparable Sales

Both Robert Von Ancken, the claimant's appraiser, and Mac C. Seltzer, the City's appraiser, used a market value approach for their valuations of all the land acquired in this proceeding. That is, they used comparable sales in arriving at their appraisals. Each of them presented an individual list of comparable sales, in which there were four sales in common. Of the four sales that are common, claimant's Sale No. 4 is City's Sale No. 19; claimant's Sale No. 6 is City's Sales Nos. 14A and 14B; claimant's Sale No. 9 is City's Sale No. 12, and claimant's Sale No. 11 is City's Sale No. 10.

In view of the nature of the subject property, sales of similar property in the vicinity, reasonably near the valuation date or the date of title vesting in point of time, is a proper method of appraising the value of these damage parcels. (*Matter of City of New York [Shorefront High*

School-Rudnick], mod., 26 N Y 2d 748, 25 N Y 2d 146, 148; *Village of Lawrence* v. *Greenwood,* 300 N.Y. 231, 236-237; *Bero* v. *State of New York,* 33 A D 2d 88, affd. 27 N Y 2d 977; *Freiberger* v. *State of New York,* 33 A D 2d 619; *Matter of North Hempstead,* 73 Misc 2d 815; see 1 Orgel, Valuation Under Eminent Domain [2d ed.], §§ 137, 138.) Of course, in the analysis of these sales the appraisers should make appropriate adjustments for time or economic trend, location, size, topography and other differences among the comparables themselves and between each of the comparables and the subject property. (*Latham Holding Co.* v. *State of New York,* 16 N Y 2d 41; *International Business Machine Corporation* v. *State of New York,* 35 A D 2d 750; *Warren* v. *State of New York,* 33 A D 2d 819; cf. *Merrithew* v. *State of New York,* 38 A D 2d 996.) Both of the appraisers have done so. The degree of comparability then becomes a question of fact. (*Latham Holding Co.* v. *State of New York, supra,* at p. 46; *Morris* v. *State of New York,* 41 A D 2d 864; *Harvey Chalmers & Sons, Inc.* v. *State of New York,* 35 A D 2d 864; *Freiberger* v. *State of New York, supra; Kastelic* v. *State of New York,* 29 A D 2d 803.)

Though the court admitted all of the proffered sales into evidence, it is clear that some of them were of no assistance in determining the value of the subject parcels, and, as set forth below, these were not given any weight. As was stated in *Matter of North Hempstead* (*supra,* 73 Misc 2d at pp. 819-820):

> "The threshold question on admissibility [of sales] is prima facie similarity (*Perper* v. *State of New York,* 15 Misc 2d 787; *787 Central Park Ave.* v. *State of New York,* 5 A D 2d 628). Such prima facie finding of similarity, however, does not require the trier of facts to give any weight to the evidence thus admitted (*Levin* v. *State of New York,* 13 N Y 2d 87, 92). Courts regularly admit

> sales which are prima facie comparable only to hold them to be of 'no assistance in determining the value of the damage parcels being considered.' (*Matter of City of New York [2460 Jerome Ave. Realty Corp.]* 18 A D 2d 991; *Matter of City of New York [Marshall]*, 16 A D 2d 570)."

On behalf of the claimants, Mr. Von Ancken submitted eleven sales, of which one was a lease. His list showed an overall price per square foot after adjustments for time (at 10% a year up to the beginning 1974), location, shape, topography, zone and other factors.

Mr. Seltzer submitted a list of twenty comparable sales on behalf of the City. He gave increments for plottage, corner and double frontage. However, unlike Von Ancken, his adjustment for time was 6% a year to the date of title vesting. His adjustment for zoning was 50%, that is, he valued land in M2-1 and M3-1 zones as worth 50% more than land in an M1-1 zone. Von Ancken on the other hand made a zoning adjustment of 5% for property zoned M2-1 and 10% for property zoned M3-1. These differences in adjustments created substantial variations in the indicated or adjusted basic value of the respective comparable sales.

1. *Zoning*

The subject property is zoned in an M1-1 Use District as established by the Zoning Resolution. The M1-1 Use District is a light manufacturing district designed for a wide range of manufacturing and related uses conforming to a high level of performance standards. The M2-1 district is designed for manufacturing and related activities which can meet a medium level of performance standards. The M3-1 district is designed for heavy manufacturing to accommodate heavy industrial uses involving more objectionable influences and hazards, and thus cannot reasonably be expected to conform to the performance standards which are appropriate for most other types of industrial development.

A large and varied number of manufacturing uses are permitted in all three of these districts. In an M2-1 district permissible uses and performance standards are greater and broader than in an M1-1 district. In an M3-1 district, in addition to the uses permitted in an M2-1 district, noxious manufacturing uses are permitted.

Both appraisers, as stated above, found property in M2-1 and M3-1 districts, because of more and broader uses, to be more valuable than property in an M1-1 district. The City's expert emphasized particularly that the allowable Floor Area Ratio (F.A.R.) in the two former districts were twice the allowable F.A.R. in an M1-1 district, in which the subject property was located. In the opinion of both appraisers, this was the governing consideration in the difference between the value of property in the M2-1 and M3-1 zones as compared with property in an M1-1 zone. The City's appraiser estimated that property in an M1-1 zone was worth, all other elements being equal, only one-half the value of the property in the M2-1 and M3-1 zones. In this connection, it should be noted that the difference in the F.A.R. could only affect the value of building improvements. To get twice the floor area, however, would require the additional expense of either constructing a two-story building or acquiring a plot with twice the area. The adjustment for zoning adopted by the City's appraiser is, accordingly, unacceptable.

While the City's appraiser makes the same zoning adjustment for sales in M2-1 and M3-1 districts, the claimant's appraiser makes a distinction. In his opinion, M1-1 property is worth 5% less than M2-1 property and 10% less than M3-1 property. The court agrees with this view of the claimant's appraiser, that is, that a difference exists between the value of M2-1 property and M3-1 property, inasmuch as the Zoning Resolution permits more and broader uses in M3-1 districts.

The court finds, however, that the zoning adjustment made by claimant's appraiser is insufficient while this adjustment as made by the City's appraiser is highly excessive. A zoning adjustment of 15% should thus be made in favor of property in an M2-1 zone and 20% in favor of property in an M3-1 zone.

2. *Adjustment for Time Trend*

In making an adjustment for time or economic trend in the analysis of his comparable sales, as stated above, the claimant's appraiser has increased his basic units at 10% a year to the beginning of 1974, while on the other hand, the City's appraiser applied this upward adjustment at 6% a year.

This court has already found that sales comparable to the College Point area should be adjusted at 10% a year. (*Matter of City of New York, [College Point Industrial Park Urban Renewal Project II]* Sup. Ct., Queens Co., Index No. 14056/72, Mar. 31, 1977, Adjustment for Time Trend.) Accordingly, the court accepts the estimate of claimant's appraiser, and finds that an adjustment for time trend in connection with the comparable sales at 10% a year is reasonable and proper.

3. *Increments*

There are items arising out of the size and location of a particular parcel of real property that are to be added as increments in appraising its value. The adjustment for size is termed "plottage", while the adjustments for location are called "conjunctive use" or "double frontage", and "corner". The claimant's appraiser has allowed increments for plottage and double frontage in valuing Golf

City and for plottage and corner in valuing the Tully & Di Napoli parcel (Damage Parcel No. 19). The City's appraiser, on the other hand, has allowed increments for plottage and corner in valuing both Golf City and Damage Parcel No. 19. Allowances for these adjustments were also made by each appraiser in the analysis of his comparable sales. The increments were generally added by percentages of the measured areas involved.

The various increments will now be considered.

a. *Plottage*

Plottage has been defined as the percentage added to the value of two or more contiguous lots held in one ownership. The increment is accorded by reason of the fact that the aggregate of the lots have a greater value than the sum of the individual lots, because as a group they admit of a larger and more advantageous disposition or improvement than a single lot. (See 4 Nichols, Eminent Domain [rev. 3d ed.], §12.35; 19 N.Y. Jur., Eminent Domain, §166; *People ex rel Penna., N.Y. & L.I.R.R. Co. v. O'Donnel,* 130 App. Div. 734, 736.)

The courts have generally approved an allowance of 10% for plottage. (*Matter of Port of N.Y. Auth. [Lincoln Tunnel-450 West 34th St. Corp.]*, 2 N Y 2d 296; *Matter of City of New York [Park Row-Walsh]*, 17 A D 2d 534, 537; *Matter of City of New York [Throgs Neck Expressway-Marshall]*, 16 A D 2d 570, 576, revd. on other grounds, 13 N Y 2d 700; *Matter of City of New York [Lincoln Square Slum Clearance Project-Maxwell]*, 15 A D 2d 153, 173-74 aff'd 12 N Y 2d 1086, aff'd 497; 4 Nichols, Eminent Domain, *ibid.*) With respect to Golf City, claimant's appraiser has allowed a plottage increment of 15%. Although it has been held "that 15% would be the highest increment that assemblage could add to the unit" (*Matter of City of New York [Maxwell] supra,* 15 A D 2d at p. 174), the court finds no justification for such an allowance here.

On the contrary, in this instance there is ample reason for fixing the allowance at less than the usual 10%.

The most authoritative real estate appraisers make it clear that after the size of a plot has reached the area of maximum utility the law of diminishing returns sets in. Beyond that point the property has a greatly reduced plottage value and in some cases no plottage value whatever. An assembled plot because of its large size may be less valuable than the total of the individual lots included. Ordinarily, the plottage increment is allowed only up to the size which represents the highest and best use of the property. As parcels are added the increment becomes smaller and smaller until it disappears. There is an area for each case at which additional land in the same ownership will not enhance its unit value. (See McMichael's Appraising Manual [4th ed.], pp. 424-430.)

In the instant case, the Golf City property is comprised of a very large area, 653,200 square feet. Considering its highest and best use to be its present use as a recreational area, the court finds that a 5% allowance for plottage is appropriate for Golf City, and 10% for the Tully & Di Napoli parcel (which measures 19,875 sq. ft.)

b. *Double Frontage*

In appropriate cases, an increment of 5% for each street frontage where the lot has a double frontage, or a total of 10% has been approved. (*Matter of Port of N.Y. Auth. [Lincoln Tunnel-450 West 34th St. Corp.], supra; Matter of City of New York [Throgs Neck Expressway-Marshall], supra,* at pp. 575-76.) For the reasons stated below the court finds that the instant case is not appropriate for allowing an increment for double frontage.

The Golf City site has a frontage of 790 feet on 20th Avenue, a principal thoroughfare in the area, but it has a frontage of only 36 feet on 15th Avenue. The latter avenue, while it is an open street, is paved for only one block and that pavement is only 28 feet wide on a 70-foot street. It lies wholly in a residential area and was little used because of its location and condition. The 15th Avenue frontage, moreover, was fenced and never used by the owner. Altogether, the frontage was insignificant in size and was located on an insignificant street.

The claimant's appraiser because of the small size of the frontage allowed a double frontage increment on only 5%, based upon his judgment and experience. What is more important, however, is that he testified that the allowance for double frontage here was based entirely upon his projected use of the property as a shopping center. But this court has found that the highest and best use of the property was not as a shopping center, (see *infra,* Highest and Best Use), and, consequently, the basis for his double frontage allowance falls completely.

While the fact that the owner did not actually put the 15th Avenue frontage to use may perhaps not be crucial (see *Matter of City of New York [Tompkins Street],* 213 App. Div. 187, 190), what is decisive is the insignificance of the size of the 15th Avenue frontage and of the street itself.

Upon this record, the court finds that no increment for conjunctive use (double frontage) should be allowed for the Golf City site, but that an increment of 10% for double frontage should be allowed for Damage Parcel No. 19.

c. *Corner*

An increment for corner influence has been generally recognized in making appraisals. (McMichael's Appraising Manual [4th ed.], p. 516 *et seq.;* The Appraisal of Real Estate, Am. Inst. of R.E. Apprs. [6th ed.], p. 126.) Such an allowance has received judicial approval. (*Matter of Port of N.Y. Auth. [Lincoln Tunnel-450 West 34th St. Corp.], supra,* at p. 301; *Matter of City of Rochester [Genesee Crossroads-Herman],* 36 A D 2d 683.)

With respect to Golf City, the claimant's appraiser has made no allowance for corner, while the City's appraiser has made such an allowance. He has done so, however, on the assumptions that the owner did not have title to the land in the beds of the mapped streets and that a certain percentage of the site would have to be set aside for streets. Since the court has rejected these assumptions (see, *ante,* II, Valuation of Mapped Streets), the basis for making the allowance cannot stand. Both appraisers have made such an allowance with respect to Damage Parcel No. 19.

Accordingly, upon this record, the court finds that no increment for corner should be allowed for Golf City, but than an increment of 1000 sq. ft. for corner should be allowed for Damage Parcel No. 19.

a. *Damage Parcels Nos. 1, 2, and 5 through 15*

(i) *Claimant's Sales*

Von Ancken's Sale No. 2 is in an M2-1 zone. It is a small parcel containing only 5,000 square feet. This was an expansion sale to acquire additional parking space for the Pathmark Shopping Center. It was purchased for a special purpose and use and, therefore, cannot be considered a truly comparable sale. For these reasons this sale must be rejected.

Sale No. 5 is in an M1-1 zone. It is a very large tract of land, in excess of one million square feet on Metropolitan Avenue in Glendale, Queens, several miles from the subject property. It is in an industrial and business district and the subway is in the northeast corner of the property. This sale is thus not comparable to the subject parcels and for that reason is rejected.

Sale No. 7 consists of a lease and its indicated value is based on capitalization. It is in an M2-1 zone and was improved with a shopping center, located on the Whitestone

Parkway. This sale is lacking in comparability and is, therefore, rejected.

Sale No. 8 is in an M3-1 zone, located on the west side of Vernon Boulevard in Long Island City, abutting the East River. By reason of its superior location and site characteristics, and its distance from the subject parcels, it is not truly comparable and accordingly is rejected.

Sale No. 10 is in an M2-1 zone and has an area of approximately 292,000 square feet. It is located on a full block between 55th and 56th Avenues in Maspeth, Queens, several miles from the College Point area. It is used for truck and employee parking by United Parcel Service. Because of its distance from the subject parcels and its superior location, it is not a comparable to the subject parcels and is, therefore, rejected.

Sale No. 12 consists of an assemblage of various lots. The parcel was rezoned to C4-2 prior to purchase. A new shopping center has been constructed on the site to house several large department stores. It is completely lacking in comparability because of its distance from the subject parcels and its superior location, and for those reasons is rejected.

The court thus accepts claimant's Sales Nos. 1, 4, 6, 9 and 11 as comparable.

(ii) *The City's Sales*

Of the twenty sales submitted by Mr. Seltzer, five were in M3-1 or M2-1 zones. All the others were in an M1-1 zone.

Sale No. 1, although in an M1-1 zone, was purchased in August 1968. It is a very small parcel containing only 4,000 square feet. It is not reflective of the subject damage parcels and is, therefore, rejected.

Sales Nos. 2 and 3 were acquired by the same purchaser in October, 1968. Each of the parcels contains 6,000 square feet and are not reflective of the subject damage parcels. Furthermore, each has a superior location, and although the basic price is $2.88 per square foot the overall price per square foot is $7.28 due mainly to adjustments for time trend, location, and topography. The sales are, accordingly rejected.

Sale No. 7 is a sale to Queens Transit Corp. It has an area of 18,000 square feet and sold for $4.02 a square foot in March 1969. It enjoys excellent location, condition and topography. It is also serviced by utilities and analyzes to an adjusted overall price of $8.80 a square foot. Furthermore, the purchaser was undoubtedly induced to purchase this parcel at an excessive price because it was acquired for employee parking in conjunction with the main office and omnibus terminal across the street. This sale is, therefore, rejected.

Sale No. 11 was a purchase in October, 1968, and consisted of vacant land and a small building which was later demolished. The adjustments for location, condition and topography were so excessive as to increase a basic price of $3.23 a square foot to $8.30 a square foot. Accordingly, the sale is rejected.

Sale No. 17 is in an M1-1 zone and was sold in February, 1971. It has a land area of 4,000 square feet. It is rejected for the same reason as is Sale No. 1.

Sale No. 18 is in an M-1 zone and was conveyed in June, 1972 to the same grantee as Sale No. 1. It is a very small parcel containing only 2,000 square feet and was purchased for addition to the sale No. 1 property. The sale is, therefore, rejected.

Sale No. 20, located in an M1-1 zone, was sold in August 1973. It contains 13,450 square feet and was purchased as additional land for an existing modern industrial plant to be used partially for parking. It must be discounted because it was an expansion purchase. The sale is, therefore, rejected.

The court, accordingly, accepts the City's Sales Nos. 4, 5, 6, 8, 9, 10, 12, 13, 14, 15, 16 and 19.

B. *Awards*

a. *Damage Parcels Nos. 1, 2, and 5 through 15*

Damage Parcels Nos. 1, 2, and 5 through 15 (Golf City) consists of a plot with an area of 653,200 sq. ft. used as an amusement and recreation center. It is improved with a golf driving range, a batting range, a one-story arcade building, a pro-shop, a small one-story restaurant, and two miniature golf courses. It lies some 500 feet west of the Whitestone Expressway, with a frontage of 790 feet on 20th Avenue, which as heretofore stated, is one of the principal streets in the College Point area. All utilities are available at the property.

The claimant has already received an award for the improvements and fixtures. Only an award for the land remains to be made.

Claimant's expert included Damage Parcel No. 4 in his appraisal report. It is now conceded that Damage Parcel No. 4 is owned by the City of New York. At the trial, the claimant's appraiser testified that if this were so his appraisal should be decreased by $39,900. So corrected, the following are the respective appraisals:

Claimant	*City*
$6,270,600	$2,878,800

An issue has arisen with respect to what the highest and best use of the Golf City property was. That issue will now be considered.

(i) Highest and Best Use

The New York State Constitution mandates that property shall not be taken without just compensation. (N.Y. Const., Art. I, §7.) As a general rule just compensation is measured by the fair market value of the property. (*Keator*

v. *State of New York,* 23 N Y 2d 337, 339; *Matter of Board of Water Supply,* 277 N. Y. 452; see 2 Lewis, Eminent Domain, §706). Fair market value has been defined as "the price for which the property would sell if there was a willing buyer who was under no compulsion to buy and a willing seller under no compulsion to sell". (*Keator* v. *State of New York, supra;* see 29A C.J.S., Eminent Domain, §137.) Since it is well recognized that the market place pays for potential use despite present use (M. Robert Goldstein and Michael J. Goldstein, Highest and Best Use, N.Y.L.J., Apr. 6, 1976, pp. 1, 4), in determining fair market value the claimant is entitled to have the appraisal based on the highest and best available use of the property irrespective of whether he is so using it. (*Matter of County of Suffolk [Firester],* 37 N Y 2d 649, 652; *Keator* v. *State of New York, supra.*)

On January 1, 1972, and on June 25, 1974, the latter being the date of title vesting, Golf City was used as a recreation and amusement area. It was improved with a golf driving range, a batting range, a one-story arcade building, a pro-shop, a small one-story restaurant, two miniature golf courses, and some amusement devices. Nevertheless, the claimant's appraiser was of the opinion that the highest and best use of the subject property was as a shopping center. His entire appraisal is based on that opinion. In his appraisal report there is not one word about any other possible use of the property. This was also true of his initial oral testimony. It was not until his cross examination that he stated that its recreational use was also a highest and best use.

Furthermore, claimant's appraiser never made an economic feasibility study for a shopping center. Such a study is an essential element in determining whether a projected use of the propery is indeed its highest and best use. In *Matter of City of New York (Broadway Cary Corp.)* (34 N Y 2d 535) the unanimous Court of Appeals held:

> "Claimants failed to substantiate their contention that the highest and best use of the condemned parcels, situated in an area zoned for light manufacturing, was for the erection of a community shopping center. Their evidence in this regard related to the physical feasibility of such a complex without any reference to or evidence of the economic feasibility of proposed venture, and in these circumstances there was a failure to show its highest and best use to be for a shopping center." (Id. at 536)

In addition, the record is clear that the projected use could not be accomplished. In fact, it was not, and by the end of January, 1974, after several years of unremitting efforts, the claimant admitted to PDC that the shopping center project was not economically feasible, and abandoned it. The contemplated use was, accordingly, only speculative and hypothetical, and a "use which is not more than a speculative or hypothetical arrangement in the mind of the claimant may not be accepted as the basis for an award." (*Matter of City of New York [Shorefront High School-Rudnick]*, 25 N Y 2d 146, 149 mod. 26 N Y 2d 748; See also *Matter of City of New York [Broadway Cary Corp.], supra; Triple Cities Shopping Center, Inc. v. State of New York*, 26 A D 2d 744, affd. 22 N Y 2d 683.)

The City has appraised the value of the subject property on the basis that its present use was its highest and best use.

Upon all of the evidence in the record, the court concludes that the highest and best use of the Golf City property is the use to which the owner was putting it, namely, as a recreation and amusement area.

(ii) *Valuation*

The claimant's estimate of value is made as of June 25, 1974, the date of title vesting. The City's appraiser estimated his value as of August 15, 1974 (which he erroneously believed to be the title vesting date) and trended that valuation back to January 1, 1972. This court has already held the valuation date to be January 1, 1972 (see *ante*, I, The Valuation Date), and the court's award will be based upon value as of that date. If the claimant's appraisal were to be trended back to January 1, 1972, it would have to be reduced by 20% (on the basis of his time trend adjustment of 10% a year to the beginning of 1974), computed, that is, for two years from January 1, 1972, to January 1, 1974. His appraisal would then come to $5,016,480 (80% of $6,270,600). Moreover, the claimant's appraiser valued the Golf City property at $8.00 a square foot. If this value were to be similarly trended back to January 1, 1972, that is, reduced by 20%, his basic unit would be $6.40 a square foot.

Both appraisers agree that the gross area of Golf City is 653,200 square feet. Claimant's appraiser adds increments of 15% for plottage and 5% for double frontage, or total increments of 20%. This results in increments of 130,640 sq. ft. (20% of 653,200 sq. ft.) and a total area for valuation of 783,840 sq. ft. (653,200 sq. ft. plus 130,640 sq. ft.). The City's appraiser, however, values the land in the bed of the mapped streets at a different square foot basic rate than he does the remaining area of the subject property (see *ante,* II, Valuation of Mapped Streets), and, as there stated, his valuation of the land in the mapped streets is contained in his increments. Thus, he starts with an area of 461,552 sq. ft. as the area of Golf City outside of the mapped streets. To this he adds 46,156 sq.ft. (or 10%) for plottage and 18,000 sq. ft. for corners, giving him a total area for valuation of 525,708 sq. ft. (see City's Exh. 25, page following p. 11).

As stated above, the court holds that the land in the beds of the mapped streets are to be given full fee value (see, *ante,* II, Valuation of Mapped Streets). Accordingly, the court starts with the area of Golf City at 653,200 sq. ft.

The claimant's appraiser, as stated above, allows increments for plottage and double frontage (conjunctive use), while the City's appraiser allows increments for plottage and corner. The corner increment, however, is applied only because the City's appraiser distinguishes between the land in the beds of the mapped streets and the rest of the area. But this distinction the court has already rejected. As held above, the court here allows an increment of 5% for plottage and makes no allowance for double frontage (see, *ante,* III, 3, Increments). The court, therefore, allows an increment of 32,660 sq. ft. (5% of 653,200 sq. ft.), making a total area for valuation of 685,860 sq. ft. (653,200 sq. ft. plus 32,660 sq. ft.).

As already stated, the basic valuation unit of the claimant's appraiser time trended back to January 1, 1972, is $6.24 a square foot. The adjustment for time trend applied by the City's appraiser is 15.75% (Back from August 15, 1974 to January 1, 1972, at 6% a year). So he takes 84.25% of his estimated value as of August 15, 1974 to obtain his estimated value as of January 1, 1972 (see City's Exh. 25, page following p. 11). Since his basic unit of value as of August 15, 1974 is $6.50 a square foot, his basic unit of value as of January 1, 1972 comes to $5.48 a square foot (84.25% of $6.50). Based upon the appraisals, the comparable sales and the other relevant evidence in the record, the court finds the basic square foot unit of value of the subject property to be $5.75 a square foot as of January 1, 1972. A land award is, accordingly, made to the claimant-owner of Golf City in the amount of $3,943,695, rounded to $3,943,700.

The Corporation Counsel is directed to submit a tentative decree in accordance with the foregoing.

s/LEO BROWN
J. S. C.

Decision on Admissibility of Evidence at Hearing of Objections.

SUPREME COURT,

QUEENS COUNTY.

Special Term, Part IV-A

[SAME TITLE.]

By: Leo Brown, J. Index No. 6439/74
Dated: April 20, 1978

The issue presented for determination herein is whether on a hearing of objections pursuant to section B-15-22.0 of the New York City Administrative Code, the Court has authority to accept new testimony and/or evidence on behalf of the claimant.

Although there may be no absolute right to introduce new evidence and/or testimony at the hearing of objections (see *Matter of City of NY [Addition to Lincoln Square Urban Renewal Projects]*, NYLJ, May 11, 1960, p 12, col 7f), the law is clear that the court may in its discretion afford either side that opportunity. (*Matter of City of NY [Union Turnpike]*, 154 Misc 455, affd 243 App Div 811, affd 268 NY 681; *Matter of Main Street, Borough of Queens*, City of NY, 45 NYS2d 453).

Thus the question remains as to whether under the circumstances herein, the court should permit the introduction of new testimony and/or evidence in the proceeding before it. On that issue it is the City's contention that the evidence to be introduced is not brand new; that such evidence was available and could have been subpoenaed at the time of trial; and that claimant's failure to do so precludes it from introducing such evidence at the hearing of objections.

Since the trial record clearly indicates that the Public Development Corporation promised to produce the documents without the necessity of claimant serving a subpoena, and inasmuch as claimant's counsel rested his case, subject to putting into evidence the documents in issue, in the interest of justice, this court in its discretion will allow the introduction of the new evidence at the hearing of objections.

Accordingly, the City's objection to the introduction of the documents in issue is overruled.

LEO BROWN
J. S. C.

Decision After Hearing of Objections.

SUPREME COURT,

QUEENS COUNTY.

Special Term, Part 4-A

[SAME TITLE.]

By: Brown, J. Index No. 6439/74
Dated: October 12, 1978

In this condemnation proceeding, a hearing of objections pursuant to section B15-22.0 of the Administrative Code of the City of New York was held before me on February 15, 16, 17 and March 21, 1978, and from the credible evidence adduced thereat the court finds the following:

The evidence introduced by claimant demonstrated that other land owners who sought temporary exclusion from condemnation received that exclusion without having sent a letter similar to that of claimant's, dated September 9, 1971. This additional proof, however, does not by itself alter the factual basis of this court's prior decision of June 1, 1977.

Accordingly, the court adheres to its original decision and the objections to the valuation date of January 1, 1972, as well as other objections submitted at the hearing, are denied. The Corporation Counsel is directed to prepare a final decree in accordance with the foregoing.

LEO BROWN
J.S.C.

Decree.

At a Special Term, Part IVA of the Supreme Court of the State of New York, held in and for the County of Queens, at the Courthouse at 88-11 Sutphin Boulevard, in the Borough of Queens, City of New York, on the 29th day of November, 1978.

Present:

Honorable Leo Brown

[SAME TITLE.]

The City of New York having heretofore made application to this Court for an order authorizing the condemnation of the real property acquired in the above entitled proceeding and directing that the compensation to the owners of the said real property be determined by this Court without a jury, and said application having been granted by an order of this Court dated June 24, 1974, and entered in the office of the Clerk of the County of Queens on June 25, 1974, and pursuant to the approval of the Deputy Mayor of The City of New York, dated May 28, 1974 (Certificate No. CBX-6242), title to the real property acquired herein vested in The City of New York on the date of the entry of the order granting the City's application to condemn, to wit: June 25, 1974; and four similar surveys, diagrams, maps or plans of the real property acquired having been prepared and filed upon which was stated the amount or valuation at which each parcel of real property acquired had been assessed for purposes of taxation on the City Rolls for each of the three years preceding the date of the selection of such property; and one of such surveys, diagrams, maps or plans having been duly filed at the office of the agency submitting the departmental estimate, and second in the office of the Corporation Counsel, the third in the office of the Register of the County of Queens, and the fourth in the office of the Commissioner of Real Estate; and the Corporation Counsel having duly filed in the office of the Clerk of the County of Queens, a notice of the pendency of this proceeding, describing the property affected and the persons interested therein, all pursuant to the statutory provisions applicable thereto; and thereafter the Corporation Counsel having caused to be published in the City Record, a corporation newspaper, the notice required by statute, requiring the owners of the property acquired to serve and file their claims and to submit proof of title in the manner prescribed by law; and claims having been filed herein and proofs of title having been submitted to the Corporation Counsel, and the Corporation Counsel having duly served all parties or attorneys for said purpose appearing with a Note of Issue, designating the County of Queens as the County in which the trial of said proceeding should be had; and the proceding should be had; and the proceeding having been regularly brough on for trial before the

HONORABLE LEO BROWN, one of the Justices of this Court, at Special Term, Part Iv, for the Hearing of Condemnation Proceedings, held in the County of Queens, at the Courthouse 88-11 Sutphin Boulevard, in the Borough of Queens, City of New York, on January 5, 1976, adjourned and continued from time to time; and The City of New York and various claimants having appeared upon the trial in person or by counsel; and the Court having heard the allegations and proofs of the claimants and of The City of New York, and the arguments of counsel; and the Justice presiding at the trial having viewed the property acquired, and the Court after considering the proofs and testimony of The City of New York and the claimants herein, having directed the preparation of the Second Separate and Partial Tentative Decree herein in instructions contained in its decision dated June 15, 1977 published in the New York Law Journal on or about June 3, 1977; and the Corporation Counsel having made a Second Separate and Partial Tentative Decree dated September 26, 1977, containing a estimate of the compensation which should justly be made to the owners of and the persons interested in said property; and the said Justice having annexed to said Tentative Decree, by reference to the First Separate and Partial Final Decree, a copy of the Damage Map of the property prepared for and used by the Court upon the trial; and each and every parcel of land having been designated in said Tentative Decree by a Damage Parcel number with reference to said Damage Map; and the names of the owners of and persons interested in said lands and premises, so far as the same could be ascertained, having been stated in the said Tentative Decree, together with the maps annexed thereto by reference, having been duly filed in the office of the Clerk of the County of Queens on September 28, 1977, for the inspection of whomsoever it might concern; and the Corporation Counsel of The City of New York having caused to be published in the City Record the notice required by statute of such filing of said Tentative Decree, and that objections thereto by any party aggrieved might be filed and served in the manner prescribed by law; and objections thereto pursuant to said notice, having been filed by various parties and persons; and objections if any having duly some on to be heard before this Court at Special Term, Part IVA, for the Hearing of Condemnation Proceedings on February 15, 16, 17 and March 21, 1978.

NOW, on reading the objections filed by the various claimants and The City of New York; and on reading the testimony, proofs and evidence taken upon the trial, and upon the filing of the opinion of the Court; and the alterations, changes and corrections of the Tentative Decree directed to be made in the instructions of this of this Court, and the Court having directed the preparation of Second Separate and Partial Final Decree herein in instructions contained in its Memorandum decision published in the New York Law Journal having been made in accordance therewith; it is

ORDERED, ADJUDGED AND DECREED, that all other objections filed herein be and the same hereby are in all respects overruled; and it is further

ORDERED, ADJUDGED AND DECREED, that the amounts set opposite the respective damage parcels in the column headed "FINAL AWARDS," in the tabular abstract annexed to and made part of this Final Decree, amounting in the aggregate to the sum of FOUR MILLION ONE HUNDRED THIRTEEN THOUSAND EIGHT HUNDRED FOUR DOLLARS AND NO CENTS . . .$4,113,804.00 constitute and are the just compensation which the respective owners of said damage parcels are entitled to receive from The City of New York for the taking of the property in this proceeding, which amounts have been ascertained and determined as of June 25, 1974, the date of vesting of title in The City of New York; and it is further

ORDERED, ADJUDGED AND DECREED, that each of the awards as set forth in the said tabular abstract is subject to all taxes, assessments, water rates and other lawful charges due and unpaid and a lien on the property acquired herein on June 25, 1974; and it is further

ORDERED, ADJUDGED AND DECREED, that pursuant to Chapter 1055 Laws of 1960, the owner of a condemned parcel of real property herein who has paid taxes, water rates, sewer rents or other lawful charges covering a period subsequent to the vesting of title therein in The City of New York, shall be reimbursed therefor in the sum which is allocable to the period subsequent to the vesting of title; and it is further

ORDERED,ADJUDGED AND DECREED, that the Comptroller of The City of New York, upon payment of any of the awards herein to the Director of Finance of The City of New York as required by law, shall deduct from such awards all unpaid taxes, assessments, water rates and other lawful charges which are liens upon said awards, and upon making such payment to the Director of Finance of The City of New York; The City of New York shall be discharged from any and all liability in respect to said awards so paid.

Entered in Queens County

JB
J. S. C.

Granted
Nov. 29 1978
John J. Durante
Clerk.

John J. Durante
Clerk

Filed & Recorded
'78 Dec 1 PM 12:32
County Clerk
Queens County

Abstract of the Awards.

SUPREME COURT,

QUEENS COUNTY.

[SAME TITLE.]

SECOND SEPARATE AND PARTIAL
TENTATIVE DECREE

6439/74

Tabular Abstract of Damage & Damage Maps

(For Damage Maps see First
Separate & Partial Final Decree

W. BERNARD RICHLAND,
Corporation Counsel

FILED
Dec 1 1978
County Clerk
Queens County

SUPREME COURT QUEENS COUNTY

In the Matter of the Application of The City of New York, relative to acquiring title in fee simple absolute to a portion of real property required for a project known as College Point Industrial Park Urban Renewal Project II Stage III within the areas bounded generally by 15th Avenue, 20th Avenue, Old Salt Pond, 139th Street, 141st Street, Whitestone Expressway, Ulmer Street, Stratton Avenue, and one half the street beds of 130th

Street, 131st Street and 30th Avenue adjacent to Block 4360, in the Borough of Queens, City of New York, title in fee for such purposes has not been heretofore acquired by the City of New York.

SECOND SEPARATE AND PARTIAL TENTATIVE DECREE

Tabular Abstract of Damage & Damage Maps

(For Damage Maps see First
Separate & Partial Final Decree)

W. BERNARD RICHLAND,
Corporation Counsel

FILED
Dec 1 1978
County Clerk
Queens County

NEW YORK SUPREME COURT AWARDS FOR DAMAGE

SECOND DEPARTMENT

In the matter of the application of The City of New York, relative to acquiring title in fee simple absolute to a portion of real property required for a project known as College Point Industrial Park Urban Renewal Project II Stage III within the areas bounded generally by 15th Avenue, 20th Avenue, Old Salt Pond, 139th Street, 141st Street, Whitestone Expressway, Ulmer Street, Stratton Avenue, and one half the street beds of 130th Street, 131st Street and 30th Avenue adjacent to Block 4360, in the Borough of Queens, City of New York, title in fee for such purposes has not been heretofore acquired by the City of New York.

in the . . . . Ward, Borough of . . . . . ., The City of New York. Abstract of the Supreme Court in the above-entitled matter made and filed according to law.

Damage Parcel Nos.	Owners		Awards Final
	Second Separate and Partial Final Decree		
1, 2 & 5 thru 15 incl.	Saul Saveth as to 50% Leo Marinello as to 25% Leonard Marinello as to 25%	Land	3,943,700.00

Pursuant to Order of this Court dated April 7, 1975.

Subject to:

1. Mortgage in the sum of $146,400.00 made by Westboro Properties Inc. to Abe Hirschfeid, 1 Talbot Place, Great Neck, Zerubavel Rebina, 8 Maxwell Dr. E., W. Hart. Conn., dated 1/22/60, recorded 1/25/60 in Liber 7686 Mp. 160; assigned to Zerubavel Rabina, by assignment dated 5/16/61, recorded 5/29/61 in Liber 7855 Mp. 488; assigned to 20 East 31st Realty Corp. by assignment

Damage Parcel Nos.	Owners Second Separate and Partial Final Decree	Awards Final
	dated 3/1/63, recorded 3/6/63 in Liber 8135 Mp. 460; assigned to Lafayette National Bank of Brooklyn In New York, by assignment dated 1/28/64, recorded 2/7/64 in Liber 8346 Mp. 141; assigned to and now held by Washington Heights Federal Savings and Loan Association, by assignment dated 2/1/66, recorded 2/10/66 in Liber 36 of Records, at page 417. 2. Mortgage in the sum of $180,000.00 made by Napan Construction Corp. to Westboro Properties Inc., dated 8/8/60 recorded 8/11/60 in Liber 7754 Mp. 487; assigned to Lafayette National Bank of Brooklyn In New York, by assignment dated 1/31/64, recorded 2/7/64 in Liber 8346 Mp. 144; assigned to and now held by Washington Heights Federal Savings and Loan Association, by assignment dated 2/1/66, recorded 2/10/66 in Liber 36 of Records, at page 417.	

Damage Parcel Nos.	Owners Second Separate and Partial Final Decree	Awards Final
	3. Mortgage in the sum of $106,510.00 made by Floyd Bennett of Flushing Inc. to Napan Construction Corp., dated 1/31/62, recorded 2/7/62 in Liber 7960 Mp. 83; assigned to credit Merchants Co. (a co-partnership), dated 1/28/65, recorded 2/2/65 in Liber 8568 Mp. 35; assigned to and now held by Washington Heights Federal Savings and Loan Association, by assignment dated 2/2/66 recorded 2/10/66 in Liber 36 of Records, at page 421.	
	4. Mortgage in the sum of $35,560.00 made by Brell Realty Corp. to Lafayette National Bank of Brooklyn In New York, dated 1/31/64, recorded 2/7/64 in Liber 8346 Mp. 128; assigned to and now held by Washington Heights Federal Savings & Loan Association by assignment dated 2/1/66, recorded 2/10/66 in Liber 36 of Records, at page 417.	

Damage Parcel Nos.	Owners	Awards Final
	Second Separate and Partial Final Decree	
	5. Mortgage in the sum of $168,490.00 made by Westboro Properties Inc. to Brell Realty Corp., dated 12/17/64, recorded 12/22/64 in Liber 8544 Mp. 415; assigned to and now held by Washington Heights Federal Savings and Loan Association, by assignment dated 2/1/66, recorded 2/10/66 in Liber 36 of Records, at page 424.	
	6. Mortgage in the sum of $152,026.08 made by Westboro Industries Inc. to Westboro Properties Inc., dated 9/14/65, recorded 9/20/65 in Liber 8715 Mp. 124; assigned to Saul Savetti, Leo Marinello, Philip Lagana and Charles Follini, by assignment dated 9/29/65, recorded 9/30/65 in Liber 8721 Mp. 251; assigned to and now held by Washington Heights Federal Savings and Loan Association, by assignment dated 2/3/66, recorded 2/10/66 in Liber 36 of Records, at page 429.	

Damage Parcel Nos.	Owners	Awards Final
	Second Separate and Partial Final Decree	
	7. Mortgage in the sum of $76,973.92 made by Westboro Industries Inc. to Washington Heights Federal Savings and Loan Association, dated 2/3/66, recorded 2/10/66 in Liber 36 of Records, at page 433.	
	8. Mortgage in the sum of $100,000.00 made by Westboro Industries Inc. to Washington Heights Federal Savings and Loan Association, dated 4/20/66, recorded 4/21/66 in Liber 102 of Records, page 5.	
	9. Mortgage in the sum of $743,986.67 made by Westboro Industries Inc. to Washington Heights Federal Savings and Loan Association, dated 8/20/71, recorded 9/10/71 in Liber Reels 508 page 1370.	
	Which by its terms consolidates Mortgages Liber 7686 p. 160; Liber 7754 p. 487; Liber 8346 p. 128; Liber	

Damage Parcel Nos.	Owners Second Separate and Partial Final Decree	Awards Final
	7960 p. 83, Liber 8544 p. 415; Liber 8715 p. 124; Liber 36 Rp. 433; Liber 102 p. 5 into a first mortgage for $1,320,000.	
	10. Franchise taxes, if any, due and owning from the following corporations:	
	a. Floyd Bennett of Flushing Inc. and or Summit Flushing Corp., to 12/27/63.	
	b. Brell Realty Corp., to 12/22/64.	
	c. Westboro Properties Inc., to 9/20/65.	
	d. Westboro Industries Inc., to date.	
	11. New York City Business Corporation Taxes, if any, due and owning from Westboro Industries Inc., to date.	
3	The City of New York Land & Impt.	19,700.00
4	The City of New York Land & Impt.	1.00
16	Unknown Owner Land & Impt.	1.00

Damage Parcel Nos.	Owners		Awards Final
	Second Separate and Partial Final Decree		
17 & 18	Unknown Owners ($1.00 each)	Land & Impt.	2.00
19	Tully & Di Napoli Inc.	Land & Impt.	150,400.00

Subject to:

1. Mortgage in the sum of $60,000.00 made by Tully & DiNapoli Inc. to Long Island City Savings Bank, dated 10/1/63, recorded 10/8/63 in Liber 8270 page 238; assigned to and now held by Columbia Asphalt Corp., 127-50 Northern Boulevard, Queens, by assignment dated 5/9/73, recorded 6/15/73 in Liber 676 page 269.
(Covers Tax Block 239 Lot 15 Only).

2. Blanket Mortgage in the sum of $750,000.00 made by Tully & Di Napoli Inc. to Franklin National Bank, dated 6/5/69, recorded 6/20/69 in Reel 332 page 47; assigned to and now held by Columbia Asphalt Corp.,

Damage Parcel Nos.

Owners

Awards Final

Second Separate and Partial Final Decree

3. Blanket Mortgage in the sum of $850,000.00 made by Tully & Di Napoli Inc. to Franklin National Bank, dated 6/5/69, recorded 6/20/69 in Reel 322 page 54; assigned to and now held by Columbia Asphalt Corp., 127-50 Northern Blvd., Queens, by assignment dated 5/15/73, recorded 6/15/73 in Reel 676 page 266.

Consolidation and Spreader Extension Agreement dated 5/25/73, recorded 6/15/73 in Reel 676 page 271 between Columbia Asphalt Corp. and Tully & Di Napoli Inc., consolidates and spreads Mortgages Liber 8270 Mp. 23, Reel 332 page 47, Reel 332 page 54 into a single 1st mortgage lien in the amount of $725,448.40, and as consolidated assigned to Security National Bank, 127-50 Northern Blvd., Queens, by assignment dated 5/15/73, recorded 6/15/73 in Reel 676 page 263.

Damage Parcel Nos.	Owners Second Separate and Partial Final Decree	Awards Final

115 Broad Hollow Road, Mulville, New York by assignment dated 5/25/73, recorded 6/15/73 in Reel 676 page 289.

4. Blanket Mortgage in the sum of $808,666.54 made by Tully & Di Napoli Inc. & Tully Enterprises Inc., successor by merger to The Grenwolde Corp. to Security National Bank, 115 Broad Hollow Road, Melville, N.Y., dated 5/25/73, recorded 6/15/73 in Reel 676 page 294.

ASSIGNMENT OF LEASES & RENTS

5. Tully & Di Napoli Inc., Tully Enterprises Inc. successor by merger to the Greenwolde Corp., dated 5/25/73 recorded 7/12/73 Reel 683 p. 1532 to Security National Bank, given as security for the payment of the obligations of Columbia Asphalt Corp. in the amount of $1,700,000.

U.C.C.

Damage Parcel Nos.	Owners	Awards Final
	Second Separate and Partial Final Decree	
	6. Debtor: Tully & Di Napoli Inc. & Tully Enterprises Inc. successor by merger to Greenwolde Corporation. Secured Party: Security National Bank filed 6/18/73 #73 P 13067 Affecting Block 788 Lot 10, Block 789 Lot 10, Block 1791 Lot 52 Block 1830 Lot 10 and Block 4364 Lot 63, Financing Fixtures, fittings, etc.	
	FEDERAL TAX LIENS	
	7. a) Tully & Di Napoli Inc. Assessment date 11/19/73 F 837 filed 5/16/74 Amount $6,099.38.	
	b) Tully & Di Napoli Inc. Box 145, Flushing, N.Y. Assignment date 2/20/70 F 1824 filed 9/23/74 Amount $8,613.88.	
	8. Franchise taxes and New York City Business Corporation taxes, if any, due and owing from Tully & Di Napoli Inc., to date.	
	TOTAL AWARD	$4,113,804.00

Raising of Federal Questions at Trial.

(202) Mr. Greco: As I stated, the petitioners contend that the City's Exhibit 5 is the basis of this case. I think it should be read in totality and in no way is it considered a waiver, and if the Court—let me say this, Judge. If the Court would uphold the City's contention here, I think it would be a denial of due process on one of the owners within the whole area (203) was discriminated again, where other owners who had the same rights, their property wasn't taken, allowed to stand by and enhance their value to the detriment of this one little client who went in and spent thousands of dollars on plans, who legitimately tries to get a plan while the testimony was that the others whose land was excluded didn't do anything. It would be unconstitutional and I am going to make a motion on it.

* * *

(402) Mr. Greco: Now, at this point, your Honor, I move to strike out the exhibit put in by the City with reference to this particular issue and the testimony given by Mr. Bernstein on the grounds that exhibit 5 in no way is it their main thrust to be considered a waiver, since it must be read in totality and the best it was was a letter of memorandum which it says, and that this letter of memorandum requires the City to do certain steps, and that the certain steps that they were required and failed to do.

Furthermore, to apply this penalty to this owner (403) would be a violation of his constitutional rights. He would not be entitled to the same protection and same rights as other owners of property. The power of condemnation—

The Court: You are not claiming they did it, involuntarily?

Mr. Greco: I say what they did was not consummated, that it was merely a proposal—

The Court: Go ahead. Because I think you are asking me to do this as a matter of law and I don't see how I can do it, as a matter of law. What the matter of fact may be is different. That I have to determine as the trier of the facts, but your motion means that I have to decide all this, as a matter of law. Does it not?

Mr. Greco: The power of condemnation should not be used as a weapon. It's a very sacred power on the part of the municipality, to acquire private property where you have got private business, private enterprises.

The Court: You are not challenging the condemnation. I will not permit you to do it on this motion, to challenge the condemnation. If you wanted to challenge the condemnation, there was a proper (404) forum in which you could do it. I am here to try the question of what award should be made for the property taken and that is the only question before me. What award should I make for the property taken, that is.

Mr. Greco: I am saying that we are denied our constitutional rights by this action of the City of New York on this one point.

The Court: Not until you get compensation which is not just compensation. If you get compensation which does not constitute just compensation, then I can see that you might be deprived of the constitutional right but until that point comes, I don't see how you can possibly be deprived of it. There—this is not the forum in which you can raise the propriety of the condemnation and the steps that were taken to carry it out.

All you can be doing here is challenging an award which the Court would make on the ground that it doesn't constitute just compensation, it is legally invalid as a principle of evaluation or some such ground. On that basis, I can't sustain the grounds of your objection to strike this testimony.

Mr. Greco: Judge, I will say while the City is coming forth, I am denied equal protection of the (405) laws while the other property owners are not subject to this penalty clause, if it is a penalty clause, if it is a waiver; we are asked to be subject to this. Not to the detriment of the City of New York, your Honor, but certainly to our detriment, and I think that in that phase it is unconstitutional if your Honor would award a valuation.

* * *

(407) The Court: The motion requiring the Court to find, as a matter of law, that the undertaking stated by the claimant in City's Exhibit 5 is ineffective and null and void for various reasons including unconstitutional deprivation of property without due process and equal protection of the law, are issues which the Court cannot determine, as a matter of law.

They contain issues of fact which the Court must resolve as the trier of the facts. Furthermore, the City has raised the question as to the proper valuation status in this proceeding. Normally, a valuation condemnation is made as of title vesting date.

The question and issue raised by the City is the question of whether or not, either by contract or through waiver, the claimant has not relinquished the right to get an award as of the title vesting date but as of that date some substantial time before.

Finally, the grounds raised by the claimant are really grounds that seem to anticipate that the (408) award will be an erroneous award. There is no basis for that on the record because proof as to the valuation of the property has not been made.

The dates in question are January 1, 1972, the date stated in the City's Exhibit 5, and June 24, 1974, the date of title vesting. So far as this Court is concerned, there is no proof before the Court that the valuation of this property was any different on January 1, 1972 than it was on June 24, 1974.

Until the record is made complete the Court is without basis, any basis to determine a proper and just compensation for this property. Finally, the Court wants to point this out to the claimant's attorney. The Court made a proposal—I don't remember—the Court does not remember now whether it was made formally or the record or informally to counsel because counsel for the claimant stated to the Court that a substantial difference in the value of the property existed as between January 1, 1972 and June 24, 1974; the Court proposed to the parties that there be a bifurcated trial and that the issue of the valuation status date be tried, separately, and that the Court enter an interlocutory judgment with respect to those issues from which either of the (409) parties who felt aggrieved could appeal, and that issue determined by an appellate court before the quantum of the ward would be made.

Counsel rejected that proposal by the Court, both for the claimant and for the City, and instead adopted or exercised the option of going ahead with the proof of the award in a single trial which would also require the resolving of the issue as to what the valuation status date is.

For all of these reasons the Court denies the motion to strike.

Mr. Greco: I respectfully except, your Honor.

City's Exhibit 5—Letter of Intent Dated September 9, 1971.

GOLF CITY

DIVISION OF WESTBORO INDUSTRIES, Inc.

140-15 20th Avenue,

Whitestone, N. Y. 11357

September 9, 1971

Mr. Richard K. Bernstein
Executive Director
New York City Public Development Corp.
217 Broadway
New York, N. Y. 10007

Dear Mr. Bernstein:

In accordance with our discussions held with the Public Development Corporation over the past few months we herewith set forth our Letter Memorandum of Understanding relative to a proposed redevelopment project for our property at Golf City located at 140-15 20th Avenue, Whitestone, in the College Point Industrial Park.

As owners of the Golf City parcel and in keeping with the provisions of the Urban Renewal Plan for the College Point Industrial Park, it is our desire to redevelop this parcel as private owners under the Urban Renewal Plan. Presently, Golf City is operated as an all year recreational golf driving range with two miniature golf courses, a pro shop, a restaurant facility, a baseball batting range and an amusement slide.

In view of redevelopment activity at College Point generated by the Public Development Corporation and in keeping with the goals of the City of New York, we have conceived and propose to build a dramatic project which will materially enhance the use of our land as well as provide substantially greater employment opportunities and tax ratables.

Our land parcel consists of approximately 15 acres and we propose a project of a multi-purpose structure which will consist of the following elements:

(a) 330,000 square feet of industrial space to be available on small structured units for manufacturing purposes.

(b) 66,000 square feet of commercial space plus a super market facility of 28,000 square feet.

(c) A cultural center of 57,000 square feet to be used for trade shows, conventions, spectator sporting events and trade displays.

(d) A unique golf driving range of 578,000 square feet on the roof of our project.

(e) Also on the roof a pro shop and amusement area of 7,000 square feet and a restaurant of 15,000 square feet to serve the entire project area.

Thus our proposed building area will total 667,200 square feet and will be built on a land site of 1,128,204 square feet of which we presently own approximately 700,000 feet. The project provides a total of 1,087 car park spaces, which will necessitate acquisition of City-owned land for this purpose.

Westboro Industries is a closely held private corporation, consisting of Saul Saveth and Leo Marinello.

As you are further aware, we have retained Joseph A. Trapani of Bayside, New York to prepare the architectural plans, a preliminary study copy of which, dated 4/1/71, has been furnished to you and is appended to this Letter Memorandum. We have also prepared feasibility and cost estimates indicating the project cost in excess of $20,000,000. We have also made detailed enquiries with respect to permanent project financing for a development of this nature and our realty agent and advisor has indicated that financing from a leading institution is available. We have also obtained indications from prospective users with respect to the commercial space and are developing a proposal from Frank J. Cundari Enterprises, Inc. of Paterson, N. J., a leading promoter for letting of the proposed trade center. Additionally, we have tested the market with respect to our ability to rent the industrial space and we herewith represent that such space can be built by us and let to industrial tenants at $2.10 per square foot.

We estimate that after approval of the project by the required City agencies we can adhere to the following construction timetable; completion of the engineering plans and specifications and commencement of project construction by December of 1972 with demolition of existing Golf City facilities as construction progresses; completion of foundations and piling for the project by December of 1973; substantial completion of the entire project inclusive of all building structures thereon by June of 1975.

Our confidence in this project is further enhanced due to our experience in having developed and operated one of the finest golf recreational centers in the area and the fact that Golf City has been and can continue to be a successful business venture enhancing the value of our project.

In order to develop this project on the scale herein contemplated, as principle owners of approximately 15 acres, it is necessary for us to acquire parcels adjoining our property in the Industrial Park, as shown on annexed map, Study VI, consisting of approximately 11.5 acres for the purpose of providing adequate parking for our project.

This land is now substandard and vacant and in City ownership and subject to the requirements and controls of the Urban Renewal Plan and is far less in value to the land presently owned by us on which the proposed construction is to be done.

We agree, subject to the appropriate approval of the Board of Estimate, the Borough Improvement Board, the City Planning Commission and other agencies involved, and the Public Development Corporation Board of Directors, to acquire the necessary excess land at a cash purchase price of $3.55 per square foot in a sale which would provide for our guarantee of completion of the project as agreed.

We also agree to reimburse the Public Development Corporation for its reasonable expenses and outlay in connection with services, appraisals, title expense, attorneys fees and charges and other related transaction costs involved in this land transfer.

We further represent that the industrial area in our project should encompass a minimum of 1260 industrial jobs; that the commercial area should employ upward of 100; that the cultural center should employ 175; and the golf and restaurant facility should employ 75 persons, giving the project a job density exceeding 60 jobs per acre.

Westboro Industries, Inc. as the proposed Urban Renewal redeveloper for this area within the College Point Industrial Park fully realizes that urban renewal action and other approval of these plans is dependent upon the appropriate resolutions and approvals of the various City agencies involved and of the Board of Estimate, and it is understood that this Memorandum does not in any way bind the City of New York, and its agencies or the Board of Estimate, or PDC.

It is further understood and agreed that appropriate provision will be made upon approval of the sales transaction to us and have binding guarantees to provide for our completion of the project. We further agree to the adoption of the request by the City of the condemnation award of the land and for any present improvement existing as of the date of such condemnation to be based upon the value as of January 1, 1972 if, in the event in the future our project would fail and the City would be required to condemn our parcel for other land redevelopment use in the College Point Industrial Park. Any subsequent improvement with respect to our proposed project is to be valued as of date of condemnation. We agree to this method because we are convinced we are able to build, and develop to completion, our project concept.

Since construction is to begin, and principally take place on our land, we would desire a contract to purchase the excess City-owned parcel with requisite down payment on contract and the right to close title to the excess parcel at a date when it is actually required for improvement thereon in accordance with our building program.

We would hope that this Memorandum of Understanding would impel the necessary City and Public Development Corp. action to lead towards project approval and agreement for excess land acquisition. If satisfactory to you, kindly indicate acceptance by signing the copy enclosed herewith and return to the undersigned. If you have any questions, kindly contact our attorneys: Max E. Greenberg, Trayman, Harris, Cantor, Reiss and Blasky, 100 Church Street, New York City.

Very truly yours,

WESTBORO INDUSTRIES, INC.
SAUL SAVETH
Vice President

Accepted: ______________________________
New York City Public Development Corporation

SS:sc

Opposition

Office
F
JUN 7 1982
ALEXANDER L. STEVAS, CLERK

No. 81-2128

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

LEO MARINELLO, LEONARD MARINELLO, and SAUL SAVETH, Owners of Damage Parcels Nos. 1, 2 and 5 through 15, inclusive,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

FREDERICK A. O. SCHWARZ, Jr.
Corporation Counsel of the
City of New York
100 Church Street
New York, N.Y. 10007
(212) 566-4338 (or 4375)

LEONARD KOERNER,
MORRIS EINHORN,
of Counsel.

June 5, 1982

Question Presented

Where owners of a 15-acre tract, located within an urban renewal area planned for development as an industrial park at a cost of $50 million to the municipality, propose to develop their land as part of that industrial park pursuant to a plan viewed by the municipality as highly speculative, and the owners therefore agree to minimize damages to the city for delaying condemnation pending financing and approval thereof - is the enforcement of such agreement upon the owners' subsequent abandonment of their proposal constitutionally forbidden or invidiously discriminatory?

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ARGUMENT

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION PRESENTED. THE AGREEMENT NOT TO ENHANCE DAMAGES FOR DELAYING CONDEMNATION WAS PROPERLY HELD ENFORCEABLE BY THE STATE COURTS. SINCE IT WAS FULLY WARRANTED BY THE UNIQUE AND HIGHLY SPECULATIVE PROPOSAL OCCASIONING THE DELAY, IT CAN SCARCELY BE ATTRIBUTED TO INVIDIOUS DISCRIMINATION....... 28

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No. 81-2128

IN THE
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October Term, 1981

LEO MARINELLO, LEONARD MARINELLO, and
SAUL SAVETH, Owners of Damage Parcels
Nos. 1, 2 and 5 through 15, inclusive,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

Jurisdiction

Petitioner's appeal-as-of-right from an order of the Appellate Division (Second Department), increasing their award for 15 acres of land from $3,943,6[illegible] to $4,131,490, was dismissed by the New York Court of Appeals on June 9, 1981 "upon the ground that no substantial constitutional question is directly involved," and motion for leave to appeal was denied on February 25, 1982 (A1-A4, A20).*

Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1257(3).

Statement of the Case

Pursuant to an urban renewal plan requiring an infusion of $50 million in public funds to drain and prepare a swampy area in the College Point (Queens County) section of New York City for development in accordance with its zoning (industrial), the opportunity to benefit therefrom was afforded all owners in the area proposing to redevelop their own sites in accordance with the planned College Point Industrial Park (infra, pp. 4-6). Petitioners' proposal to develop their 15-acre site (used as a golf course and batting range) with a multi-purpose industrial-commercial-recreational project to cost $20 million, was viewed as a highly speculative venture by the N.Y.C. Public Development Corporation (PDC), and upon explaining its concern to petitioners that damages against the City not be increased while financing to effectuate that proposal was sought, petitioners agreed to a fixed valuation date.

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*Numerals in parentheses preceded by the letter A refer to pages of petitioners' appendix. All other numerals refer to pages of the record before the New York Court of Appeals.

After two trials were afforded petitioners to establish that the City had either abused its powers or was guilty of invidious discrimination in effecting such agreement, the State courts found to the contrary. Petitioners' flagrant distortions of the record proof to bolster their baseless contentions as to the City's "unconscionable" and "unjustifiably discriminatory" conduct (Petition, pp. 10, 15) necessitates a brief restatement of that proof.

Statement of Facts

(1)

The subject property, consisting of 15 acres of largely vacant land located in the College Point section of Queens County in New York City, was zoned M-1 (industrial) and devoted to recreational use as a batting range and golf-driving range operated under the name of Golf City, a division of Westboro Industries (1232, 676, 1208; 35). In September of 1967, the City Planning Commission (CPC) designated an area of approximately 560 acres in College Point as appropriate for urban renewal for predominately industrial use (2026; 2041). The CPC described that designated area as "long vacant or marginally used because of difficult subsoil and drainage problems," and the purpose of the Urban Renewal Plan (URP) was to rehabilitate the area for use as an industrial park (2026, 2036-7). A City investment of approximately $50 million for drainage, fill, streets, sanitary and storm sewers, lighting, etc. was required therefor, and acquisition of the 560 acres was to be accomplished in two stages (1196; 90-94, 2026-7). Condemnation for the first stage of the industrial park occurred in 1969 (183-4, 1961-3).*

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*The NYC Public Development Corporation (PDC), a non-profit corporation, was created in 1967 by Executive Order of the Mayor to develop all industrial parks in the City, and its board of directors was composed of prominent persons in industry, labor and government (33-34, 81-2).

On May 21, 1971, the Board of Estimate approved the balance of the area as appropriate for urban renewal in accordance with Stage II of the URP, which provided that - "A dike will be constructed for protection against high tides, and storm drainage facilities will be provided including storage ponds and pump station. Fill will be placed to bring low lying areas up to future grades * * * sewers, water lines and street lighting will be installed. * * * The development of privately owned parcels to fulfill the objectives of the URP will be encouraged" (2025-7). Thus, pursuant to the renewal plan, any owner seeking to avail himself of the improvements to be effected by the City, could "apply for exclusion of said property from acquisition * * * upon his submission to the PDC, within three months of approval of this URP, of an acceptable proposal for said development and improvement of his property for use or uses meeting the requirements of the URP" - on condition that the owner shall enter into a binding agreement to "diligently pursue the speedy completion of the development of his site" (2033-4).

On September 16, 1971, Stage II of the URP was approved by resolution of the Board of Estimate (2036; 1961-3). And on January 13, 1972, the Board authorized acquisition of the land required therefor - petitioners' land being listed in each of said resolutions (2042; 1315, 2038). Due to unanticipated delays, condemnation did not however occur until December 1, 1972 (1768).

(2)

As PDC's Executive Director, Richard Bernstein, testified at the trial herein -

PDC's policy was "to encourage development in conformance with the plan, by private owners," a letter to that effect having been "sent to all of the owners" in the Stage II renewal area on October 1, 1971, the URP having been previously published and the subject of public hearings over a 2-year period (33-34; 63-64, 110; 1679; 1746, 1789). Mr. Bernstein stated that in January of 1969 he had met with Golf City's principals, Saul Saveth (board chairman of Westboro Industries) and Leo Marinello, to explore the possibility of a combined industrial-recreational use of their land (35-38; 1750-1; 233). He further stated that PDC's staff thereafter worked with Golf City for 2 years "to make this plan practical," petitioners' proposed "multiple use development" necessitating modification of the

URP to permit such combined use (167; 1806-7, 1882-3, 1887-8).

Mr. Bernstein explained that Golf City's proposal "was a very complex, difficult proposal both from an engineering and from a financing point of view," and due to the "question mark - the skepticism as to whether this proposal could be put together, we discussed with Mr. Saveth the protection of the City" - "because we anticipated it would take a long time, if ever, for this proposal to come to fruition" (1778-9, 1771).* It was thus pointed out to Mr. Saveth that where a "speculative venture" is involved, the City was entitled to protection against the possibility that it serve but "to delay a condemnation to some future data when through the natural course of events and through our own efforts in improving the park, the value of that land would substantially increase" (212-213, 71-72, 395-7). As Mr. Bernstein testified, he had "discussed this openly and frankly with Mr. Saveth before we arrived at the formula that was incorporated in the letter of September 9, 1971" (ibid.).

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*Thus, in June of 1970, PDC had reported to the Planning Commission that there was "insufficient data to judge the economic feasibility of the proposal. This is frequently the shoal upon which multi-use development proposals founder" (1330). In August of 1970, PDC wrote Mr. Saveth "if you can demonstrate the economic feasibility" of the proposal, other problems could be resolved (1881-2). And, one year later, in August of 1971, PDC again advised Mr. Saveth that evidence was required on "financial capability of the sponsors and assurance of mortgage commitment" (2099).

(3)

Petitioners had formally presented their "proposed redevelopment project" in a memorandum of understanding to PDC dated September 9, 1971 - their property having been included in Stage II of the URP then pending before the Board of Estimate and adopted on September 17, 1971 (45-46; 1317). In that letter of September 9, 1971, petitioners described their proposal as a "dramatic project" contemplating a "multi-purpose structure" to provide - 330,000 sq. ft. of space on their 15-acre tract "for manufacturing purposes"; 66,000 sq. ft. of commercial space; "a cultural center of 57,000 sq. ft. to be used for trade shows, conventions, spectator sporting events and trade displays"; "a unique golf driving range of 578,000 sq. ft. on the roof of our project"; and "also on the roof a pro shop and amusement area of 7,000 sq. ft. and a restaurant of 15,000 sq. ft." (1317-18). They estimated the cost of their project as "in excess of $20,000,000," and assured PDC that "financing from a leading institution is available" (1319). The proposal included purchase of 11.5 acres of contiguous City-owned land at $3.55 per sq. ft. for parking purposes (1319). Their said letter of September 9, 1971 also stated that "we further agree" that in the event the project fails, any condemnation award for land and existing improvements "shall be based upon the value as of January 1, 1972," whereas "any subsequent improvement with respect to our proposed project is to be valued as of date of condemnation" (1320-1). It concluded as follows - "We would hope that this Memorandum of Understanding would impel the necessary City and PDC action to lead towards project approval and agreement for excess land acquisition" (1320-1).

Upon receipt of petitioners' said letter of September 9, 1971, PDC "authorized the consummation of this deal based on the provision of some solid documented evidence that financing was available, the scope of the financing and who it would come from" - and promptly arranged with all City agencies to process the project "when the evidence was in that the plan could be carried out" (153-156; 131, 143-144; 55; 2107). And, as Mr. Bernstein testified, PDC constantly pressed Golf City "to come forth with concrete evidence of financing that could be presented to our Board" (61-62). Thus, on February 7, 1972, PDC wrote Mr. Saveth that it was still awaiting "evidence of your capacity to finance your redevelopment proposal" since such evidence was "critical" for the formal contract necessary "to designate your property as an excluded parcel under the URP" (1189, 1195). Mr. Saveth's response on March 1, 1972 was that he was "making every effort to get to a point where we can sit down on a contractual basis as quickly as possible" (1322).

(4)

Despite petitioners' failure to submit "even a preliminary letter of commitment or indication of commitment from a major financing institution," PDC's Real Estate Committee recommended in April of 1972 that the subject property be "excluded temporarily" pending "further information to be presented" - and PDC's Board of Directors approved that recommendation in June of 1972 (1826-1830; 2076, 2081). As Mr. Bernstein stated at the trial, PDC then attempted to facilitate financing by referring Mr. Saveth to Peerage Properties, Inc., a company with a good track record on renewal projects - "who might work with them in providing the financing and the backing to carry forth their project" (62-63, 1326).

Thus, on September 27, 1972, Mr. Saveth wrote PDC that "we are in the process of working out a deal with Peerage Properties, Inc.," and requested additional time to effect necessary financing (1325). On October 12, 1972 PDC replied to that letter, stating that it was recommending "interim exclusion of your property in order to give you every reasonable opportunity" to implement the proposal "since you agreed to accept a condemnation award based upon value as of January 1,1 972" in the event failure to do so necessitated condemnation (1326). It was also there pointed out that - "To date, your redevelopment plan has not been submitted with sufficient definition for the City or our Board to make a realistic judgment. Thus, the Board and the City have never been in a position to formally act upon or approve your proposal of September 9, 1971" (1326; 189-190). And Mr. Saveth responded to that letter on December 29, 1972 - after the subject property had actually been excluded from the condemnation of December 1, 1972 - by thanking PDC for "playing the role of honest broker" with respect to Peerage, and reiterating that "we will satisfy your people as to the financial responsibilities and the ability to perform" (1190; 1834-5).

Petitioner, however, never obtained financing nor any commitment therefor and, in January of 1974, "withdrew their proposal," advising PDC that "it would be economically unfeasible to enter into such a redevelopment project" (70; 1328; 154, 1821-3, 1826-9, 1979). The subject site was condemned several months later (70).

Petitioner Saveth admitted that he had fully understood the meaning of the January 1, 1972 valuation date specified in his letter of September 9, 1971 (259-

262); that although a bank had "agreed to entertain financing" of his proposed $20 million redevelopment project, no loan was ever approved (246-7); that his letter to PDC of January 30, 1974 "that it was not economically feasible is correct" (249, 267-8); and that petitioners' new proposal of January 14, 1974 was rejected outright by PDC after 5 years of working on the original one - Mr. Bernstein "just dusted me off" (241-3; 166; 2108-9).

(5)

Since the subject site was not the only parcel excluded from condemnation on December 1, 1972, petitioners sought to establish invidious discrimination in that no agreement on a fixed valuation date had been effected as to the 16 similarly excluded parcels, a listing of which was placed in evidence (2115). And 18 months after the trial was completed (in July of 1976) and that contention found baseless, petitioners' offer of additional proof on invidious discrimination led to reopening of the record, the Court stating that it "would bend every effort to permit the claimants to make proof" thereof (A48-49; 1180; 75a; 1736-9).

Petitioners thereupon recalled Mr. Bernstein, who again testified that 5 of the 10 additionally excluded parcels (Queens Transit; Marquette Cement; Premium Oil; Jet Asphalt; Mascali) were merely segments of parcels already devoted to industrial use in conformity with the URP, and would never have been listed for acquisition had PDC possessed "the information that subsequently was developed as to ownership, use and so forth" (1934-5; 1813). The witness further stated that

7 additional parcels were excluded because they were too small and "impractical for PDC and the City to acquire and rent for any kind of large scale industrial development" and, moreover, they were already either devoted to industrial use or committed thereto by their owners - namely, Facchin, Poindexter, Carratu, Dobson, Cavalacci, Penno, Wilkinson (1934; 2078-80; 1810-11; 1868-70).

Having already described PDC's doubts as to the viability of petitioners' proposed $20 million multi-use project, Mr. Bernstein testified that "there was nothing at all of their scope of magnitude" involved in any of the 4 remaining exclusions (113; ante, p. 9). Thus, as to the first exclusion - a 1/2 acre site which the owners (Tully & DiNapoli) planned to use as a gasoline station - the witness stated that PDC had no doubts as to its viability since it "was a realistic proposal backed by an oil company that was in a position to do something about it" (121; 173-4, 210, 1785-6; 915); and it was only because of the unforeseen oil crisis in 1973 that the project collapsed, necessitating condemnation (390-1, 946-7; 182-3, 1956-7).

As to the second of those 4 remaining exclusions (Dayton-Whitestone), Mr. Bernstein testified - "We knew Zukerman's record in developing urban renewal properties * * * there was no question about his ability to develop the property, which was proved by the fact that he did," an office building having been erected on the site with "some 500-odd employees there" (1786-7, 1779-82; 1955-6, 1959). As to the third (Queens structure), the witness explained that 30% of that 10-acre site already "conformed to the plan and indeed was one of the better uses in the whole park"; that the owner had placed fill on the balance of the land in preparation for development; that PDC had nevertheless requested a January, 1972 valuation date be included in the development proposal, which Queens structure would not agree to; and that its property "was never condemned" at all (210-211; 1957-8, 124-7, 2075; 1951, 172-4, 1873).

The last of those 4 remaining exclusions (Adventurers Inn - HGV, Inc. a/k/a MHG Enterprises) involved a proposed amusement park which, as Mr. Bernstein explained, PDC had consistently rejected as "completely at odds with the approved industrial park plan" (1876-7; 372-3; 114, 123, 1784-5). The witness testified that when Adventurers Inn submitted a new "theme park" proposal "just prior to the taking" of December 1, 1972 - "as strongly as I was opposed to it," he was obliged to treat it as a "late submission," and when rejected by PDC in October of 1972, it was too late to include it in the December 1, 1972 condemnation (1836-9; 119-120; 209, 227, 370-3; 2067; 374-5). He pointed out, moreover, that City protection against damages from delayed condemnation was not deemed justified where PDC itself would prevent effectuation of any proposal - "if it was the City's action that prevented their carrying it out" (1878-80; 2068-9). As he stated of that proposed "theme park" - "I had no doubt that the plan would fail, because in the end the City would turn it down, and not because of any inability of MHG to carry it out" (ibid.). The Adventurer's Inn site was condemned in June of 1974 (1956-7). And, as the witness also made clear, several other owners had proposed projects that were rejected by PDC and exclusion from the condemnation of December 1, 1972 denied (1953).

State Court Opinions

a. Trial Court.

(1)

Reviewing the record proof, the Trial Court pointed out that while PDC could not accept petitioners' proposal as sufficiently definitive on financing, it nevertheless excluded the subject property from condemnation on December 1, 1972 to afford Westboro time "to demonstrate that financing was available" (A23-24). Rejecting the contention that petitioners had merely agreed to embody a January, 1972 valuation date into a more formal contract, the Court found - "the facts in this case belie that claim" (A25). It was thus noted that when advised by PDC in October of 1972 "that PDC had recommended interim exclusion relying on Westboro's agreement in the letter of September 9, 1971 to accept" the 1972 valuation date, Westboro took no exception thereto in its letter of reply assuring PDC that proof of financing would be shortly adduced (A25-26).

The Court concluded that Westboro had sought "exclusion of Golf City from the taking so as to give it the opportunity of bringing its proposed project to fruition. The performance of that act by PDC resulted in a binding contract" (A27). Agreeing to accept value as of January 1, 1972 as just compensation is not a deprivation thereof, said the Court, particularly where the parties understood that in developing a huge industrial park puruant to the College Point URP - "land values there would be likely to increase. Indeed, this is just what happened; both Westboro's and the City's appraisers having testified to this" (A29).*

(2)

After re-opening the record for additional proof as to PDC's alleged discrimination, the Trial Court rendered a second opinion stating that - "This additional proof, however, does not by itself, alter the factual basis of this court's prior decision" (A49-50).

b. Appellate Division.

The Appellate Division agreed with the Trial Court's finding that although PDC had declined to approve petitioners' proposal "until Golf City provided evidence of available financing," it did authorize temporary exclusion in reliance on the January, 1972 valuation date pending such evidence; that petitioner's response was to assure PDC that "we will satisfy your people as to the financial responsibilities and the ability to perform"; and "nothing appears in the record to indicate Westboro's repudiation or disavowal of January 1, 1972 as the award date if condemnation occurred" (A9-12). Finding that PDC had afforded Westboro full "opportunity to prove that it could make a go" of its proposed project, the Appellate Division held that Westboro's agreement to accept a January 1, 1972 valuation date in return therefor offended no public policy (A15, A17).

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*The subject 15-acre site was assessed at $893,500 and the Trial Court's award as of the agreed valuation date was $3,943,700, i.e., $6 per sq. ft. (A47; 188, 258-9; 1396). Petitioners were also awarded $850,000 for fixtures and improvements (2147).

That Court also agreed with the Trial Court that "no discriminatory treatment was practiced on the claimants," pointing out that - their $20 million proposal was unique; there was no other proposal of like magnitude; and that the reasons for excluding the 16 other parcels had been fully detailed in the record (A17-18).*

c. Court of Appeals.

As previously pointed out, petitioners' appeal as of right was dismissed by the Court of Appeals "upon the ground that no substantial constitutional question is directly involved," and leave to appeal denied (A3-4).

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*The Appellate Division increased the land award from $3,943,700 to $4,131,490 (A19-20). The City's appeal therefrom is still pending.

ARGUMENT

THERE IS NO SUBSTANTIAL CONSTITUTIONAL QUESTION PRESENTED. THE AGREEMENT NOT TO ENHANCE DAMAGES FOR DELAYING CONDEMNATION WAS PROPERLY HELD ENFORCEABLE BY THE STATE COURTS. SINCE IT WAS FULLY WARRANTED BY THE UNIQUE AND HIGHLY SPECULATIVE PROPOSAL OCCASIONING THE DELAY, IT CAN SCARCELY BE ATTRIBUTED TO INVIDIOUS DISCRIMINATION.

a. Petitioners' agreement not to enhance damages for delaying condemnation was openly arrived at and consistent with law.

(1)

Petitioners' "reasons for granting the writ" (Pet., p. 10) are predicated upon a rampant distortion of the record proof. Thus, in asserting that the writ is warranted because "[t]he New York courts have sanctioned conduct on the part of a condemnor which greatly erodes the right of owners to receive just compensation for their property," petitioners deplore "the

City's unconscionable conduct" in seeking protection from damages for delayed condemnation and urge that "the manner in which this waiver was extracted - in the form of the unfair penalty clause foisted upon petitioners - was clearly unconstitutional" (Pet., p. 10). The record not only fails to support these charges, but shows them to be false.

As already detailed, the College Point urban renewal plan entailed a $50 million City investment to drain and improve a swampy area so as to create an industrial park (ante, pp. 4-6). The record shows that upon condemnation for Stage I of the renewal plan in 1969, PDC worked with petitioners for two years in preparing the multi-use project set forth in their proposal of September 9, 1971; modified the URP to assure its conformity with Stage II thereof; constantly advised petitioners that proof of financing and economic feasibility was essential for PDC acceptance of that proposal; and also advised Mr. Saveth of PDC's concern that should their speculative $20 million proposal be abandoned, the City not be faced with a demand for enhanced values resulting from the City's "own efforts in improving the park" - "we discussed this openly and frankly with Mr. Saveth before we arrived at the formula that was incorporated in the letter of September 9, 1971" (ante, pp. 8-14).

Petitioners, moreover, are discreetly silent on that portion of the formula which secured them against any loss from their proposed project by providing that - "Any subsequent improvement with respect to our proposed project is to be valued as of date of condemnation" (ante, p. 12). In short, had petitioner obtained financing for a $20 million project that then foundered in mid-construction, the City would be obligated to compensate at full value for a development it had approved as the land's best use, and then attempt completion of the aborted project, while petitioners would be saved harmless - a point noted by the State courts (A15).

Nevertheless, as the record makes clear, PDC bent every effort to assist petitioners in obtaining financing, Mr. Saveth acknowledging PDC's role as "honest broker" with respect thereto - just as he subsequently acknowledged (in January of 1974) that the proposal was "economically unfeasible" and financing therefor unobtainable (ante, pp. 14-16). To say, therefore, that the City took "unconscionable advantage" of petitioners in protecting itself from damages for delayed condemnation; that such protection amounts to a "penalty" against petitioners - a word used on virtually every page of the petition; that PDC "refused to give the go-ahead" in order to obtain the subject site at a "bargain price" (Pet., pp. 11-12, 14) - is to deal in fictions not only unsupported by, but contrary to, the record proof.

(2)

It is, in fact, basic law that where land is within the scope of a public development to which government is committed, as was the subject property within the planned industrial park to which the City was committed - "no enhancement in value attributable to the project is to be considered in awarding compensation" despite delay in condemnation. United States v. Reynolds, 397 U.S. 14, 21 (1970); see also, United States v. Miller, 317 U.S. 369, 376-7 (1943); United States v. Cors, 337 U.S. 325, 332 (1949); U.S. v. Virginia Electric Co., 365 U.S. 624, 636 (1961). Hence, an agreement in accordance with that basic rule is scarcely a denial of just compensation, "unconscionable," or a "penalty" (Petition, p. 14).*

Moreover, it is not constitutionally forbidden to agree upon compensation for a taking of private property; and that a party requesting delay in order to benefit from a $50 million public project may agree to save harmless the party granting it from any loss occasioned thereby, is self-evident. "The Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken." Albrecht v. United States, 329 U.S. 599, 603 (1947); see, U.S. v. Virginia Electric Co., 365 U.S. 624, 625, 632 fn. 3 (1961); Dunscombe v. Loftin, 154 F. 2d 963, 967 (5th Cir., 1946), cert. den. 329 U.S. 772 (1946); 3 Nichols (Law of Eminent Domain), §8.82, p. 8-505: "There is no doubt that an owner of land taken by eminent domain may waive his right to compensation or damages, or be estopped to make such claim."

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*As the Trial Court pointed out, the parties anticipated that "land values there would be likely to increase. Indeed, this is just what happened; both Westboro's and the City's appraisers having testified to this." (36a).

Insisting that a waiver will not be enforced where it "results from the unconscionable advantage enjoyed by one party over the other" (Petition, p. 12), petitioners rely on Fuentes v. Shevin, 407 U.S. 67 (1972) to invalidate their agreement. In Fuentes, the terms of a sales contract permitting pre-judgment seizure by a vendor of the property sold - "were parts of printed form contracts, appearing in relatively small type and unaccompanied by any explanations clarifying their meaning" (407 U.S. at pp. 94, 95). Here, in contrast, PDC's concern that the City not be obliged to compensate for values created by its own $50 million project while delaying for a highly speculative and "very complex, difficult proposal" was discussed "openly and frankly with Mr. Saveth before we arrived at the formula that was incorporated in the letter of September 9, 1971" (ante, pp. 9-10). Mr. Saveth admitted that he fully understood the significance of the language in his said letter, and the formula thus agreed upon to minimize damages protected petitioners against loss from new construction and the City against delay-damages (ante, pp. 16, 30-31).

Petitioners were not entitled to have land within the scope of the City's planned industrial park profit from values created thereby, or to obtain such enhanced values by delaying condemnation, or to shift upon the City the risk that their speculative proposal might not be economically viable or capable of financing. The matter was fully and fairly presented to petitioners - and their agreement thereto represented neither abuse of the power of eminent domain nor violation of basic public policy. See, Twin City Co. v. Harding Glass Co., 283 U.S. 353, 356-7 (1931); Frost & Co. v. Mines Corp., 312 U.S. 38, 44 (1941); cf. Parden v. Terminal R. Co., 377 U.S. 184, 186, 195 (1963). That no invidious discrimination was intended should be equally apparent.

b. An agreement not to enhance damages because of petitioners' abandonment of their speculative proposal is not invidiously discriminatory.

Petitioners claim that their agreement not to enhance damages for delaying condemnation "was unjustifiably discriminatory and violated their right to equal protection" because - "of the 17 owners whose properties were excluded from the December 1, 1972 taking by the City, petitioners were the only ones required by PDC" to agree thereto (Petition, pp. 15-16).

As aforenoted, however, after petitioners were afforded two trials to establish the alleged discrimination, the State courts found - "no discriminatory treatment was practiced on the claimants" (A18; ante, pp. 17-26). The record proof showed that 7 of those parcels were excluded from the December 1, 1972 condemnation because they were too small and "impractical" for "any kind of large scale industrial development," and 5 others had been erroneously listed for acquisition since they were integral parts of tracts already devoted to industrial use (ante, pp. 18-19; A17-18). Of the remaining 5 exclusions, only petitioners' $20 million multi-use proposal represented what Mr. Bernstein (PDC's Executive Director) described as a "speculative venture" viewed by PDC with "skepticism as to whether this proposal could be put together," because it "was a very complex, difficult proposal both from an engineering and from a financing point of view" - and "there was nothing at all of their scope of magnitude" in any other proposal presented to PDC (ante, pp. 9-12, 19). And, as already detailed, after fully and frankly discussing the high-risk nature of petitioners' proposal, the parties agreed upon a formula to minimize damages to each side - petitioners being protected thereby from any loss should their project be abandoned in mid-construction, and the City protected against rising land values in the industrial park while delaying condemnation (ante, pp. 30-31). Thus the agreement not only had a rational basis in fact and in law, but was fair to both sides.

As recently reiterated in Bordenkirscher v. Hayes, 434 U.S. 357, 364 (1978) - even "'the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification.' Oyer v. Boles, 368 U.S. 448, 456." See, City of Charlotte v. Firefighters, 426 U.S. 283, 286-7 (1976); Mackay Tel. Co. v. Little Rock, 250 U.S. 94, 100 (1919). "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." Williamson v. Lee Opt. Co., 348 U.S. 483, 489 (1955). And since "the doctrine of Yick Wo reaches only intentional or purposeful discrimination" (Mtr. of DiMaggio v. Brown, 19 NY 2d 283, 290 [1967]; Snowden v. Hughes, 321 U.S. 1, 8 [1944]), petitioners must "show a pattern of discrimination consciously practiced, as in Yick Wo v. Hopkins." People v. Friedman, 302 N.Y. 75, 81 [1956], app. dism. 341 U.S. 907 [1957]; see, Dandridge v. Williams, 397 U.S. 471, 485 486 (1970).

PDC's decision that protection was here warranted - against damages for delaying condemnation pending petitioners' attempt to obtain financing for their unique, high-risk proposal - was a business judgment unrelated to race, color, religion or any other arbitrary classification. It was no more invidious than the judgment normally required of any businessman who, in assessing the risks of a proposed venture, determines to protect himself where that risk is great. And a rational explanation for thus protecting the City against enhanced damages due to delaying condemnation for a unique, "very complex, difficult proposal" (1778-9, 1771; ante, pp. 9-12, 19) plainly precludes any suggestion of invidious discrimination - as the State courts held on the record proof herein. See, City of Charlotte v. Firefighters, 426 U.S. 283, 286-7 (1976); New Orleans v. Dukes, 427 U.S. 297, 303-4 (1976).

Conclusion

The petition for a writ of certiorari should be denied.

June 5, 1982.

Respectfully submitted,

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Petitioner's
Reply Brief

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No. 81-2128

In the

Supreme Court of the United States

October Term, 1981

LEO MARINELLO, LEONARD MARINELLO, and SAUL SAVETH, Owners of Damage Parcels Nos. 1, 2 and 5 through 15, inclusive,

Petitioners,

against

THE CITY OF NEW YORK,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Regarding the City's assertions that petitioners benefitted from the unfair arrangement mandated by the City.

While the City charges that petitioners arguments are based upon "flagrant distortions of the record proof", it is actually the City that distorts the record. Thus, the City would have this Court believe that petitioners, supposedly standing on equal footing with PDC, voluntarily entered negotiations and sought to take advantage of the

City's efforts in the area by submitting "a very complex, difficult proposal" to undertake what the City characterizes as a purely "speculative venture", and that because of petitioners' dubious plan, the City (here the wolf seeking to disguise itself in sheep's clothing) required "protection" in the form of a fixed valuation date. This is sheer sophistry.

If petitioners had any choice at all in the matter they would have been content to keep their property and continue operating their successful amusement facility. Petitioners only came forward with their proposal because PDC presented them with "an offer they could not refuse", *i.e.,* unless they redeveloped their property it would be taken from them. Far from needing any sort of "protection", the City, through PDC, unjustly used its power of condemnation to dominate petitioners and get them to do its bidding without even granting a contractually binding exemption. Thus, PDC retained the right to condemn Golf City any time it wanted.

While the City now criticizes petitioners' multidevelopment proposal as "speculative", the City itself not only induced the proposal but suggested its very form. As Bernstein of PDC admitted (1757):

> "the proposal that an acceptable use of the Golf City site would permit a certain amount of limited commercial use in combination with industrial use and recreational use was originally made by the Chairman of the City Planning Commission."

The City now seeks to penalize petitioners because they attempted, in good faith, to carry out the City's plan, pursuant to the City's project, in the hopes of keeping their property.

The City also attempts to make it appear that the one-sided arrangement between PDC and petitioners actually was fair by asserting that, since any subsequent improvement was to be valued as of the date condemnation, petitioners were "protected thereby from any loss should their project be abandoned in mid-construction". This claim is ludicious.

The City had absolutely no obligation to condemn petitioners' property or to rescue their redevelopment project. If petitioners' had been permitted to begin their project (and they never were) and had it faltered in mid-stream, the City could, and undoubtedly would, have walked away leaving petitioners in the lurch.

The City's glib attempts to justify its behavior in this case thus merely underscores the fact that, instead of agreeing to fulfill its constitutional obligation to pay just compensation, the City here abused its power of condemnation and sought to, and did, acquire petitioners' property at a bargain price. This Court should not condone the brazen misuse of sovereign power that occurred in this case and should require the City to fully compensate petitioners for the property taken from them.

The City's specious claim that the 10% annual increase in value of petitioners' property was the result of the City's redevelopment project.

Repeatedly referring to the $50 million the City supposedly intended to invest in College Point for the construction of an industrial park, the City attempts to suggest that the 10% yearly appreciation of petitioners' property during the period from January 1, 1972 to June 25, 1974 (for which it refuses to compensate petitioners) was due to the City's efforts to redevelop the area. The record shows otherwise.

The City points to no evidence which shows that any significant portion of the $50 million was actually spent. Furthermore, by the time of the trial of this action in June, 1976, it was apparent that PDC's attempt to create an industrial park was a dismal failure. Because industrial users had never expressed much interest in the industrial park project, only 80 of the approximately 300 areas in College Point available for industrial development were "developed, sold or firmly committed for industrial developments" (91-94) Apart from petitioners' proposals, PDC never had any plans or proposals for the redevelopment of the Golf City property (1931-32), and, after the taking, petitioners, as tenants of the City, still occupied the site on a reduced scale (188, 245).

Neither appraiser considered the PDC's efforts to develop the area a factor in the computation of the "time trend" for petitioners' property. Petitioners' appraiser analyzed the "general upward push in values of desirable properties in the Borough of Queens" (353) and arrived at a 10% trend through a study of comparable sales of commercial property in the area in the 1960's and 1970's (482-83, 616-18). The City's appraiser arrived at a 6% time trend by examining commercial sales in the area between 1968 and 1972, and then trended this figure forward to the June 25, 1974 vesting date (700). He noted that these sales between 1968 and 1972 were "the only evidence I could find of a trend" (847).

Finally, while the trial court at one point suggests that the City's actions might have had something to do with the increase in value (A29), the court actually based its finding that a 10% trend was proper for petitioners' property, not on the basis of PDC's actions, but on the fact that it previously had "found that sales comparable to the

College Point area should be adjusted at 10% a year." In so holding, the court noted that it "accepts the estimate of claimant's appraiser" (A36).

The City's failure to justify PDC's unconstitutional and discriminatory imposition of a fixed valuation date solely on petitioners.

The purported justifications offered by the City for the more favorable treatment it accorded other excluded property owners merely confirm that petitioners were the victims of unlawful discrimination. Thus, the City repeatedly asserts that it demanded the fixed valuation date proposal in petitioners' case because it feared that their plan, which the City itself suggested and which was compatible with the Urban Renewal Plan, might serve to delay condemnation. Yet the City freely admits that it sought no fixed valuation date from Adventurer's Inn which submitted an untimely plan that the City knew it would never approve even though it was obvious that the submission of the plan would do nothing more than delay, as it did, the otherwise certain condemnation of Adventurer's Inn.

Other after-the-fact explanations offered by the City in an attempt to explain its unlawful discrimination against petitioners also do not withstand analysis. For example, the City points to Bernstein's imaginative claim that 5 of the other more favorably treated, excluded parcels were actually parts of properties already conforming to the Urban Renewal Plan and were only mistakenly authorized for acquisition. Contrary to Bernstein's testimony, one of the 5, Marquette Cement, which submitted no plans but was nevertheless excluded from the 1972 taking, was condemned by the City in 1974 (1856-57, 1873).

The City also relies on Bernstein's testimony that 7 other parcels were excluded because "they were too small and 'impractical for PDC and the City to acquire and rent for any kind of large-scale industrial development,' and, moreover, they were already either devoted to industrial use or committed thereto." However, the record shows that, in response to PDC's urging, 3 of these owners—Pointchester, Carratu and Pegno—submitted redevelopment plans to PDC and, according to the minutes of PDC's Real Estate Committee, were excluded on the basis of these submissions* (1859, 2078-79). Furthermore, 2 of these owners actually carried out their redevelopment plans (1868-69). Thus, either Bernstein's characterization of these 7 properties as too small to ever be acquired or included in the industrial park is wholly false, or PDC was engaged in a scheme whereby it purposely misled these owners into believing their properties would be taken so as to induce them into redeveloping their properties according to the City's wishes.

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* A fourth owner, Wilkinson, apparently did not submit a formal proposal but was excluded because it agreed "to develop small industrial building on the site" (2079).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York,
June 9, 1982.

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